Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-12550

EVEREST NATIONAL INSURANCE COMPANY,
PLAINTIFF,

V.

BERKELEY PLACE RESTAURANT LIMITED PARTNERSHIP,
AMERICAN FOOD MANAGEMENT LIMITED PARTNERSHIP,
AND KH-CH CORPORATION,
DEFENDANTS-APPELLANTS,

V.

ULTIMATE PARKING, LLC
DEFENDANT-APPELLEE.

ON APPEAL FROM A JUDGMENT FOR SUMMARY JUDGMENT
OF THE SUFFOLK COUNTY SUPERIOR COURT

AMICUS CURIAE BRIEF FOR
THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS

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STATEMENT OF THE AMICUS CURIAE

The Massachusetts Academy of Trial Attorneys (the "Academy") offers this filing in response to the Court's solicitation of briefing on the question of whether a valet company owes a duty of care to the general public to refuse to return car keys to an intoxicated customer.

The Academy is a voluntary, non-profit, state-wide professional association of attorneys in the Commonwealth. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; steadfastly to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The Academy urges the Court to recognize the duty of reasonable care that a valet owes to the general public to refuse to turn car keys over to a driver who appears intoxicated, or in the alternative, to take affirmative steps to notify law enforcement upon handing the keys over to such a driver.

ISSUE PRESENTED

This Court has "recognize[d] the strong public policy in this Commonwealth against drunk driving, and the necessity for removing intoxicated motorists from the roads before they harm themselves or other persons." Commonwealth v. Grise, 398 Mass. 247, 252 (1986).

Valets occasionally encounter intoxicated customers who, when retrieving their keys, become intoxicated motorists. Does the valet owe a duty of care to prevent an intoxicated customer requesting car keys from operating a vehicle?

Alternatively, does a valet owe at least a minimal duty to take steps to prevent an obviously intoxicated individual from operating a vehicle while still under the influence of alcohol?

STATEMENT OF THE CASE

On September 27, 2008, Timothy Barletta ("Barletta") drove to and attended a birthday party at Grill 23 in Boston, Massachusetts. See A. 151, 214-15.[1] Upon arriving at Grill 23, Barletta left his vehicle with a third-party valet service, Ultimate Parking, LLC ("Ultimate"). A. 152. Ultimate provided valet services to patrons of Grill 23 pursuant to a contract between Grill 23 and Ultimate. A. 152.

Barletta remained at Grill 23 for two to three hours. A. 151, 155. While there, he showed signs of impairment, and Grill 23's manager instructed a server not to serve him additional alcohol. A. 155. At approximately 9:00 p.m., Barletta left the restaurant and presented his valet ticket to Ultimate to retrieve his vehicle. A. 155, 158. Ultimate returned the keys to Barletta; Barletta walked over to his vehicle, entered his vehicle, and drove away. A. 158.

Shortly after retrieving his vehicle, Barletta pulled onto the Massachusetts Turnpike; five to ten

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[1] The Record Appendix is cited as "A." followed by page number. The Brief for the Defendants-Appellants Berkeley Place Restaurant Limited Partnership, American Food Management Limited Partnership, and KH-CH Corporation, and its Addendum, is cited as "Def. Br." followed by page number.

minutes after leaving Grill 23, he struck a Massachusetts State Police cruiser that was stopped on the side of the highway with its emergency lights activated, injuring the police officer in the cruiser, Trooper Christopher Martin. A. 162-163, 168. An officer at the scene reported that Barletta smelled strongly of alcohol and had bloodshot, watery eyes, slurred speech and difficulty comprehending the officer's questions. A. 168-169. Barletta later pled guilty to operating under the influence. A. 163.

Based on the record, Ultimate does not appear to have had a company-wide policy in 2009 for addressing a request by an intoxicated individual for his vehicle. Brian Haley, an Ultimate representative, A. 161, testified that "[d]epending on the location [the procedure] can vary dramatically." A. 343. Nonetheless, at Grill 23 during this time period, if a restaurant patron retrieving a vehicle appeared intoxicated, Ultimate's employees would report the situation to the restaurant manager. A. 160.

In 2009, Trooper Martin brought a tort action against Barletta, Barletta Engineering Corporation, and Osprey Equipment Corporation, which the parties later settled for $3.75 million. A. 163-165.

Barletta's auto insurer and his excess insurer, Everest National Insurance Company ("Everest"), paid that settlement. A. 165. Everest later brought this subrogation action against Berkeley Place Restaurant Limited Partnership, doing business as Grill 23 Restaurant and Bar, American Food Management Limited Partnership, and KH-CH Corp. (collectively, "Grill 23"), A. 6, 19-20; Grill 23, in turn, filed a Third-Party Complaint against Ultimate for contribution and indemnification (although Ultimate was later made a direct defendant). A. 7, 25-27.

Ultimate moved for summary judgment against Grill 23 and Everest, arguing that Ultimate had no duty to prevent its customers from driving while intoxicated. A. 10, 34-56. The trial court recognized that this was a novel issue of law. Def. Br. at 57.

The trial court analyzed the claim under a general negligence theory and held that if Ultimate had no duty to intervene or to prevent Mr. Barletta from driving his car, Ultimate could not be found negligent. Def. Br. at 57-58. The court acknowledged three types of common law duties that could apply under the circumstances, including dram shop and social host liability, negligent entrustment, and

reasonable care. Def. Br. at 57-59. The court quickly held that the first two theories did not apply. Def. Br. at 57-59.

The court examined the third theory of liability in more detail. Def. Br. at 59-62. Relying upon O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758 (1990), the trial court wrote that

> Ultimate had nothing to do with Mr. Barletta's intoxication, did not assist or profit from it, assumed no duty with respect to Mr. Barletta, and had no right to control his conduct or the use of his motor vehicle, which vehicle, in fact, Ultimate was legally obligated to return to Mr. Barletta upon his demand.

Def. Br. at 62. As a result, the court held that "Ultimate 'owed no duty to intervene on behalf of anyone at risk' because of Mr. Barletta's actions, because Ultimate 'did not create or contribute to the danger.'" Def. Br. at 62, quoting O'Gorman, 408 Mass. at 762.

The court further held that finding a duty here would lead to a slippery slope "that could expose parking lot attendants, tow truck operators and anyone else having the practical ability to deny a visibly intoxicated person access to a motor vehicle or the public roadways to substantial liability based on the

subsequent negligent conduct of that person." Def. Br. at 63.

The trial court therefore held, as a matter of law, that Ultimate had no obligation to prevent its customers from driving while intoxicated and allowed the motion for summary judgment. Def. Br. at 62, 64. This appeal followed.

ARGUMENT

It is a bedrock principle of tort law that "every actor has a duty to exercise reasonable care to avoid physical harm to others." Remy v. MacDonald, 440 Mass. 675, 677 (2004). Where a valet company is paid for its services, interacts with its customers, and is the last line of defense between an intoxicated driver and the public, the valet company should have a minimal duty of care to prevent an intoxicated individual from driving and endangering the public.

I. This Court should hold that a valet owes a duty of reasonable care to take steps to prevent an intoxicated customer from driving.

Generally, "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." Jupin v. Kask, 447

Mass. 141, 147 (2006), quoting Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 434–435 (1976). This Court decides whether a duty exists. Andrade v. Baptiste, 411 Mass. 560, 565 (1992).

This Court, in recognizing the existence of a duty, has relied on policy considerations and societal norms to hold that "[n]o better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists" (internal citations and quotation marks omitted). Jupin, 447 Mass. at 146-147. As a result, this Court has held that "[a] duty finds its source in existing social values and customs, and thus imposition of a duty generally responds to changed social conditions." Id. See Cremins v. Clancy, 415 Mass. 289, 292 (1993) (Court determines duty owed "by reference to existing social values and customs and appropriate social policy"), quoting Wallace v. Wilson, 411 Mass. 8, 12 (1991).

Further, "[a] precondition to [the existence of a] duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor." Jupin, 447 Mass. at 147.

> [A] determination of what particular downstream dangers are considered reasonably foreseeable, such that judicial recognition of a legal duty is appropriate, ultimately comes down to "public policy" factors, with the Supreme Judicial Court serving as the ultimate arbiter of how such factors are to be applied (to the extent that such issues have not been resolved by the Legislature itself).

Pantazis v. Mack Trucks, Inc., 92 Mass. App. Ct. 477, 483-484 (2017). Both of these considerations point in favor of finding a duty here.

A. Policy considerations and societal norms militate in favor of a duty.

Some duty on the part of valets to prevent intoxicated customers from getting behind the wheel corresponds to key public policy considerations in the Commonwealth. The strong public interest in preventing intoxicated driving is supported by stringent criminal laws, numerous non-profit groups working to reduce the number of intoxicated drivers on the road, and ad campaigns broadcast on television and plastered on billboards across the Commonwealth. See, e.g., Centers for Disease Control and Prevention, Sobering Facts: Drunk Driving in Massachusetts (2014), available at https://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/Drunk_Driving_in_MA.pdf (annual rate of death statistics); Mothers Against Drunk

Driving, 2018 Report to the Nation (2018), available at https://www.washingtonpost.com/news/tripping/wp-content/uploads/sites/51/2018/01/Campaign-Report-2018.pdf (ranking Massachusetts thirty-eighth among all fifty states in drunk driving prevention via legislation and law enforcement, 2.0 rating on 5.0 scale, and below national average).

This Court has "recognize[d] the strong public policy in this Commonwealth against drunk driving, and the necessity for removing intoxicated motorists from the roads before they harm themselves or other persons." Grise, 398 Mass. at 252. See also Commonwealth v. Trumble, 396 Mass. 81, 86-87 (1985) ("Clearly there exists a strong public interest in reducing the 'carnage caused by drunk drivers'"), quoting South Dakota v. Neville, 459 U.S. 553, 558 (1983).[2] As a result, there can be no real debate that

[2] The Neville Court, in turn, cited multiple cases in which the United States Supreme Court characterized with deservedly venomous language the horrific scourge of driving while intoxicated. Neville, 459 U.S. at 558-559. See, e.g., Mackey v. Montrym, 443 U.S. 1, 2 (1979) (recognizing "the compelling interest in highway safety"); Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring and dissenting) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "the problems of traffic irresponsibility and the

public policy considerations favor preventing individuals from driving while intoxicated.

As the trial court observed, no published decision in Massachusetts addresses whether a valet should shoulder the responsibility of keeping its intoxicated customers off the road. Def. Br. at 57. Nonetheless, where strong public policy considerations weigh in favor of finding a duty and individual safety is at issue, the historical trend in Massachusetts is to recognize a duty of reasonable care.

For example, this Court applied for decades what was known as the "Massachusetts Rule," according to which a property owner was relieved of tort liability for failing to remove a natural (but not artificial) accumulation of snow and ice from his or her property. See Papadopoulos v. Target Corp., 457 Mass. 368, 370 (2010). In 2010, however, this Court did away with the legal distinction between "natural" and "artificial" accumulations of snow and ice, and instead put in place a general duty to "act as a reasonable person" to prevent injury to invitees.

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frightful carnage it spews upon our highways"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield").

Id., quoting Young v. Garwacki, 380 Mass. 162, 169 (1980). This Court held that "[t]his duty required a property owner to make reasonable efforts to repair or remove any dangerous conditions, or at least to warn against any dangers not either known to the invitee or obvious to any ordinarily intelligent person and of which the property owner knew or reasonably should have known." Papadopoulos, 457 Mass. at 372.

Similarly, with respect to firearms, this Court assessed what duty a homeowner, who granted a mentally unstable third party unsupervised access to her home and the unsecured firearms inside, owed to a police officer shot by the mentally unstable third party with one of the homeowner's firearms. Jupin, 447 Mass. at 143. Relying heavily on public policy, this Court observed that a firearm, as a dangerous instrumentality, required a "heightened amount of care" and that "the costs associated with not recognizing a duty . . . are high." Id. at 151. This Court therefore held that the homeowner had a duty of reasonable care to secure her firearms. Id. at 147-148.

Here, public policy similarly demands that a valet owes a duty of reasonable care to prevent a

visibly intoxicated customer from getting behind the wheel of a vehicle. Recognition of such a duty will promote public safety but, as set forth infra, demand little of the valet industry.

B. It is foreseeable that an intoxicated driver will harm the public.

This Court, in recognizing the existence of a duty, also examines foreseeability. "Although there is a general proposition that there is no duty to protect others from the criminal or wrongful activities of third persons, there are exceptions to this proposition and many situations to which it does not apply" (internal citations and internal quotation marks omitted). Jupin, 447 Mass. at 148. As set forth in the RESTATEMENT OF TORTS (SECOND), "[a]n act or omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm[.]" RESTATEMENT (SECOND) OF TORTS § 302B (1965).

Applying these principles, this Court has held that a tavern owner owes a duty to the public not to provide alcohol to an intoxicated customer, Cimino v. Milford Keg, Inc., 385 Mass. 323, 326–328 (1982); that

a school owes a duty to protect its student from being attacked on campus where the school had warned students of the risk of being attacked, Mullins v. Pine Manor College, 389 Mass. 47, 54-55 (1983) (holding risk of criminal act was not only foreseeable but actually foreseen); and that a homeowner who owned firearms owed a duty to a police officer to safeguard those firearms. Jupin, 447 Mass. at 148.

These principles support a duty here. A valet returning a car to an intoxicant can easily foresee that the intoxicated driver may cause harm to the general public.[3] Ultimate had policies to deal with intoxicated drivers, notwithstanding that those policies varied by location. A. 343. If a restaurant patron retrieving a car appeared intoxicated, Ultimate's employees would report the situation to the restaurant manager. A. 160. Ultimate cannot now argue that the risk to the general public was not

[3] This is the logic behind imposing liability for negligent entrustment. G. L. c. 90, § 12. Indeed, liability for negligent entrustment may attach "regardless whether [the owner] has actual knowledge of" the operator's lack of proper licensure. Mitchell v. Hastings & Koch Enters., Inc., 38 Mass. App. Ct. 271, 277 (1995). "This exception to the usual requirement of actual knowledge is based on the affirmative duty imposed by G. L. c. 90, § 12, not to permit operation by one not properly licensed." Id. at 277-278.

foreseeable; like the risk of a criminal act in Mullins, the risk of an intoxicated driver causing a collision resulting in catastrophic injuries "was not only foreseeable but was actually foreseen" by Ultimate. Mullins, 389 Mass. at 55.

Moreover, under the circumstances, the vehicle is effectively a dangerous instrumentality;[4] as this Court has observed, "a person with even limited responsibility for or control over a dangerous instrumentality . . . may[] have a duty to exercise care in a situation where no such duty would exist if the instrumentality was not considered highly dangerous." Jupin, 447 Mass. at 151. This Court should recognize a duty and thereby acknowledge the high cost of operating a vehicle while intoxicated, the foreseeability of harm when an intoxicated person is allowed to drive, and that a valet company is necessarily involved far more than an innocent bystander.

[4] While the term "dangerous instrumentality" pertains to negligent entrustment, which is not at issue in this case, the logic is still sound.

II. Valet companies should owe at least a minimal duty of care to do something to prevent an obviously intoxicated individual from operating under the influence.

A minimal duty of reasonable care will not unduly burden valet companies and will not produce a "slippery slope" of liability.

A. A valet should be required to take some minimal, affirmative step when confronted with an intoxicated customer.

This Court should recognize that a valet owes a duty to take at least some minimal, affirmative step to prevent an intoxicated person from operating a vehicle. What constitutes a "minimal act" may vary from case to case, but could range from contacting restaurant management--a step that Ultimate's employee had taken in the past--to contacting law enforcement. See A. 160.

Such a minimal duty, less than the commonly understood "duty of care" in negligence cases, is not unprecedented. In Gomez v. Ticor, 145 Cal. App. 3d 622 (1983), for example, the California Court of Appeal held that the owner of an office building had a "minimal duty of care" to protect against intruders by installing a security system in the building. Id. at 633. The owner had a duty to take "minimal

precautions" to protect the public from the attacks of third parties.[5] Id. Massachusetts also recognizes a lesser duty of care owed to a trespasser on land. See, e.g., Pridgen v. Boston Hous. Auth., 364 Mass. 696, 707 (1974) (traditional rule is that "owner or occupier of land owes to a trespasser only the duty to refrain from willful, wanton or reckless conduct"); Kalinowski v. Smith, 6 Mass. App. Ct. 769, 771 (1978).

[5] Gomez is the first of a line of cases discussing the liability of a property owner to protect individuals from criminal activity on the premises. Gomez, 145 Cal. App. 3d at 633. The minimal duty recognized in Gomez has since been embellished and expanded; the scope of that duty now balances the burden on the owner against the actions that the plaintiff alleges the owner should have taken to keep the area safe, considering the foreseeability of crime in the area. See Vasquez v. Residential Invs., Inc., 118 Cal. App. 4th 269, 280 (2004). For example, in Sharon P. v. Arman, Ltd., 21 Cal. 4th 1181 (1999), abrogated by statute on unrelated procedural grounds by Cal. Civ. Proc. Code § 437c, as recognized in Aguilar v. Atl. Richfield Co., 25 Cal. 4th 826, 853 n.19 (2001), the plaintiff argued that the defendant property owner and the defendant parking services company should have provided security guards in the commercial garage where the plaintiff was sexually assaulted. Sharon P., 21 Cal. 4th at 1185. The California Supreme Court held that the defendants did not owe a duty to hire security guards because the garage had no history of criminal activity and the burden on the defendant would be disproportionately large. Id. at 1195. The core duty recognized by the Gomez court nonetheless remains good law, and the progeny of Gomez demonstrate amply that courts can find lesser duties of care when public policy warrants.

Recognizing a minimal duty of care is thus neither unprecedented nor unwarranted.

Such a minimal duty will safeguard the public without interfering with established bailment case law requiring a valet to return the vehicle owner's keys on demand. See, e.g., Commonwealth v. Doherty, 127 Mass. 20, 21-22 (1879) (requiring property placed in custody of bailee for safe keeping must be "delivered back to the owner when demanded"). In short, while this Court will find that a duty exists where "the costs of imposing the duty sought . . . are modest," the costs of imposing the minimal duty here are even less than modest. Jupin, 447 Mass. at 152.

B. The duty of reasonable care is based on objective criteria for assessing whether a customer is inebriated.

Massachusetts law is clear that in assessing whether there has been a breach of the duty of reasonable care, the court will apply an objective standard to determine whether a defendant acted reasonably. See, e.g., Feinstein v. Beers, 60 Mass. App. Ct. 908, 909 (2004). In the context of the valet's liability, such a standard would involve two real considerations: first, whether the driver

displayed outward signs of intoxication, and second, whether it was reasonably apparent to the valet that the driver was going to drive the vehicle while intoxicated.

The first element is the same as that for dram shop liability cases: the plaintiff must offer some competent evidence that "the patron's intoxication was apparent at the time he was served by the defendant." Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001), citing Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 608-609 (1996); Cimino, 385 Mass. at 327-328; Kirby v. DeLisco, Inc., 34 Mass. App. Ct. 630, 632 (1993).

The second element requires competent evidence that the intoxicant intended to operate the vehicle while intoxicated. This, too, is a question of fact. For example, if an obviously intoxicated individual claimed his or her vehicle and sat in the driver's seat, it would be safe to conclude that he or she intended to operate the vehicle. If, however, he or she was with another person who was not intoxicated and handed the keys over to that person, it would not be reasonably apparent that the intoxicated individual would be driving.

Both questions are well within the province of a jury. Most prospective jurors have seen someone intoxicated. Virtually all prospective jurors also can determine whether, under a given set of circumstances, an individual intends to operate a vehicle. These are also factual questions where, in the absence of competent evidence, a court will be readily able to dispose of the case on summary judgment.

C. Recognition of a minimal duty will not result in a slippery slope.

The concern of the trial court, that imposing liability would lead to a slippery slope down which anyone able to deny a visibly-intoxicated individual access to a motor vehicle would face liability, is misplaced. Def. Br. at 63. As a valet company, Ultimate made a business decision to contract with Grill 23 to provide parking services in exchange for payment. In doing so, Ultimate frequently dealt with customers who had consumed alcohol and could not safely operate their vehicles. Recognizing its position, Ultimate took steps to enable its employees to recognize and appropriately deal with inebriated patrons.

Unlike the facts in O'Gorman, then, this is not a situation in which Ultimate had nothing to do with Barletta's intoxication and did not profit from his conduct. On the contrary, Ultimate made it possible for Barletta to visit Grill 23 and to become intoxicated at the restaurant; Ultimate even earned money as a result of Barletta's visit and the visits of others like him.

Ultimate chose to make itself the last line of defense against an intoxicated driver taking the wheel and has profited from doing so. Under these conditions, a valet is in a unique position, and cannot be cast into the same bucket either as a bartender who refuses to serve a customer who arrives at the bar after having already overindulged or as a passerby on the street. As a result, there is no danger that the minimal duty defined here would result in a slippery slope.

CONCLUSION

The amicus urges this Court to recognize the duty of reasonable care that a valet owes to exercise reasonable care when confronted with a visibly intoxicated customer, and that a valet owes at least a

minimal duty of care to take some affirmative step to prevent an obviously intoxicated individual from operating under the influence.

Respectfully submitted,

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Dated: October 17, 2018

ADDENDUM

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ADDENDUM 1

Cal. Civ. Proc. Code § 437c

(a)(1) A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct.

(2) Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days.

(3) The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise. The filing of the motion shall not extend the time within which a party must otherwise file a responsive pleading.

(b)(1) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.

(2) An opposition to the motion shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise. The opposition, where appropriate, shall consist of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken.

(3) The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion.

(4) A reply to the opposition shall be served and filed by the moving party not less than five days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise.

(5) Evidentiary objections not made at the hearing shall be deemed waived.

(6) Except for subdivision (c) of Section 1005 relating to the method of service of opposition and reply papers, Sections 1005 and 1013 , extending the time within which a right may be exercised or an act may be done, do not apply to this section.

(7) An incorporation by reference of a matter in the court's file shall set forth with specificity the exact matter to which reference is being made and shall not incorporate the entire file.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court

shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived.

(e) If a party is otherwise entitled to summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, except that summary judgment may be denied in the discretion of the court if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.

(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause

of action, an affirmative defense, a claim for damages, or an issue of duty.

(2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion.

(g) Upon the denial of a motion for summary judgment on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion that the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists. Upon the grant of a motion for summary judgment on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order.

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.

(i) If, after granting a continuance to allow specified additional discovery, the court determines

that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication. This section does not affect or limit the ability of a party to compel discovery under the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4).

(j) If the court determines at any time that an affidavit was presented in bad faith or solely for the purpose of delay, the court shall order the party who presented the affidavit to pay the other party the amount of the reasonable expenses the filing of the affidavit caused the other party to incur. Sanctions shall not be imposed pursuant to this subdivision except on notice contained in a party's papers or on the court's own noticed motion, and after an opportunity to be heard.

(k) Unless a separate judgment may properly be awarded in the action, a final judgment shall not be entered on a motion for summary judgment before the termination of the action, but the final judgment shall, in addition to any matters determined in the action, award judgment as established by the summary proceeding provided for in this section.

(l) In an action arising out of an injury to the person or to property, if a motion for summary judgment is granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment on, the absence or involvement of the defendant who was granted the motion.

(m)(1) A summary judgment entered under this section is an appealable judgment as in other cases. Upon entry of an order pursuant to this section, except the entry of summary judgment, a party may, within 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California, 10 days if the place of address is outside the State of

California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the initial period within which to file the petition shall be increased by two court days. The superior court may, for good cause, and before the expiration of the initial period, extend the time for one additional period not to exceed 10 days.

(2) Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefs may include an argument that additional evidence relating to that ground exists, but the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefs to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefs, a rehearing shall be ordered upon timely petition of a party.

(n)(1) If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to the motion that has been granted shall be deemed to be established and the action shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty remaining.

(2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied.

(3) In the trial of an action, neither a party, a witness, nor the court shall comment to a jury upon

the grant or denial of a motion for summary adjudication.

(o) A cause of action has no merit if either of the following exists:

(1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.

(2) A defendant establishes an affirmative defense to that cause of action.

(p) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(q) In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.

(r) This section does not extend the period for trial provided by Section 1170.5.

(s) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4 (commencing with Section 1159) of Title 3 of Part 3.

(t) Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision.

(1)(A) Before filing a motion pursuant to this subdivision, the parties whose claims or defenses are put at issue by the motion shall submit to the court both of the following:

(i) A joint stipulation stating the issue or issues to be adjudicated.

(ii) A declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement.

(B) The joint stipulation shall be served on any party to the civil action who is not also a party to the motion.

(2) Within 15 days of receipt of the stipulation and declarations, unless the court has good cause for extending the time, the court shall notify the stipulating parties if the motion may be filed. In making this determination, the court may consider objections by a non-stipulating party made within 10 days of the submission of the stipulation and declarations.

(3) If the court elects not to allow the filing of the motion, the stipulating parties may request, and upon request the court shall conduct, an informal conference with the stipulating parties to permit further evaluation of the proposed stipulation. The stipulating parties shall not file additional papers in support of the motion.

(4)(A) A motion for summary adjudication made pursuant to this subdivision shall contain a statement in the notice of motion that reads substantially similar to the following: "This motion is made pursuant to subdivision (t) of Section 437c of the Code of Civil Procedure. The parties to this motion stipulate that the court shall hear this motion and that the resolution of this motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement."

(B) The notice of motion shall be signed by counsel for all parties, and by those parties in propria persona, to the motion.

(5) A motion filed pursuant to this subdivision may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment.

(u) For purposes of this section, a change in law does not include a later enacted statute without retroactive application.

ADDENDUM 2

G. L. c. 90, § 12. Employing unlicensed motor vehicle operator; permitting person with suspended or revoked license to operate motor vehicle; permitting person with ignition interlock devise license restriction to operate motor vehicle without devise; penalties.

(a) Whoever knowingly employs for hire as a motor vehicle operator any person not licensed in accordance with this chapter shall be punished for a first offense by a fine of not more than $1,000 and, for a second or subsequent offense, by a fine of not less than $1,000 nor more than $1,500 or imprisonment in the house of correction for not more than 1 year, or both such fine and imprisonment.

(b) Whoever, being the owner or person in control of a motor vehicle, knowingly permits such motor vehicle to be operated by a person who is unlicensed or whose license has been suspended or revoked shall be punished for a first offense by a fine of not more than $1,000 or by imprisonment in a house of correction for not more than 1 year or, for a second or subsequent offense by a fine of not less than $1,000 and not more than $1,500 or imprisonment in a house of correction for not more than 2 ½ years, or both such fine and imprisonment.

(c) Whoever knowingly permits a motor vehicle owned by him or under his control, which is not equipped with a functioning ignition interlock device, to be operated by a person who has an ignition interlock restricted license shall be punished by 1 year in the house of correction and a fine of not more than $500 for a first offense or, for a second or subsequent offense by a fine of not more than $1,000 or imprisonment in a house of correction for not more than 2 ½ years, or both. For the purposes of this section the term "certified ignition interlock device" shall mean an alcohol breath screening device that prevents a vehicle from starting if it detects a blood alcohol concentration over a preset limit of .02 or 20 mg of alcohol per 100 ml of blood.

(d) The registrar may suspend for not more than 1 year the motor vehicle registration of a vehicle used in the commission of a violation of this section or the license or right to operate of the person who commits a violation of this section, or both.

RULE 16(k) CERTIFICATION

I, Kevin J. Powers, hereby certify that the Brief herein complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 18; and Mass. R. App. P. 20.

Kevin J. Powers