

**SUPREME COURT OF TENNESSEE PROVIDES GUIDANCE ON HOW TO AVOID LIABILITY WHEN
INTOXICATED CUSTOMERS ENTER YOUR BUSINESS PREMISES**

April 14, 2017 / By Ryan A. Tombul, Esq. & James F. Exum III, Esq.

Intoxicated or impaired customers at a business present a tight rope challenge to business owners. Business owners are caught between their business interests and their legal interests. While expulsion from the premises would be the most logical solution, it may not be legally the best one.

In *Cullum v. McCool*, the Plaintiff, Ms. Cullum, was shopping for groceries at a Chattanooga Wal-Mart. Ms. Cullum finished shopping and exited the store to the parking lot to her vehicle. Unbeknownst to Ms. Cullum, Ms. Jan McCool, had also left the store and was entering a vehicle at the same time. Ms. McCool had sought prescription medications from the pharmacy department but Wal-Mart refused service because Ms. McCool appeared inebriated. Upset by her inability to obtain the medications, Ms. McCool became belligerent, and the employees ordered her to leave the store. Despite her intoxication, Wal-Mart did not call the police or take any further action.[1]

Ms. McCool backed out of her parking space, and hit Ms. Cullum, who was pinned in between the vehicles. Ms. Cullum was injured both when she was struck by the vehicle, and again when Ms. McCool subsequently attempted to help Ms. Cullum off the ground.[2]

Not surprisingly, Ms. Cullum sued Wal-Mart alleging claims of negligence and gross negligence. The Cullums alleged that "[Wal-Mart's] employees did not call the police despite Ms. McCool's intoxicated state and disorderly conduct." The Cullums claimed that the employees knew that Ms. McCool was alone on the day of the accident and that she would have to drive herself off the premises in order to comply with their instructions to leave the store. They also alleged that the employees "acted wantonly, willfully, maliciously and/or recklessly, with an indifference to and blatant disregard of the safety of others, including Ms. Cullum, by knowingly and recklessly compelling Ms. McCool to leave the store where it was plain . . . that she would be operating a motor vehicle in an intoxicated state." They noted that the employees were familiar with Ms. McCool and her "habitual intoxication." [34]

The Cullums additionally claimed that Wal-Mart had a duty to protect Ms. Cullum from harm on the premises. They alleged that "although the employees . . . recognized Ms. McCool as a danger and undertook to remove her from the establishment, they did nothing to protect or warn the customers in the parking lot." They also alternatively asserted that the employees assumed a duty to act for the protection of others when the employees expelled Ms. McCool from the store.[5]

In the Tennessee case of *McClung v. Delta Square Ltd., P'ship.* the Supreme Court adopted principles to be used in determining the duty of care owed by the owners and occupiers of business premises to customers to protect them against the criminal acts of third parties. The Court found the following principles applicable:

A business is not the insurer of the safety of its customers, but in certain circumstances, it may be required to take reasonable steps to protect its customers against foreseeable harm. We noted that "a risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by the defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would have prevented the harm." (Quoting *McCall v. Wilder*, 913 S.W.2d at 153). This balancing approach takes into account both the economic concerns of businesses and the safety concerns of customers.

Furthermore, business owners can be liable for the accidental, negligent or intentionally harmful or criminal acts of third parties, so long as those acts are reasonably foreseeable. As noted, the Restatement (Second) of Torts § 344 provides that businesses can be liable "for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons.[6]

Applying the above *McClung* principles to Wal-Mart's actions in the case at issue, The Court stated:

The injuries to Ms. Cullum were foreseeable. Wal-Mart had *actual* notice of a specific danger on its premises when the employees expelled Ms. McCool, who was belligerent and intoxicated. The probability and gravity of the harm in the parking lot were great because the employees knew that Ms. McCool would have to drive off the premises. Thus, the burden imposed upon Wal-Mart to protect its customers may be substantial. With these considerations in mind, we conclude that Wal-Mart had a duty to take reasonable steps to protect its customers because the foreseeability and gravity of the harm outweighed the burden to engage in conduct that would have prevented the harm.[7]

The Court added, "While Wal-Mart's employees may not have a legal right to *prevent* Ms. McCool from leaving the store because she was inebriated, the employees did not have to actively *expel* her from

the store without undertaking *some* measures to ensure the safety of the customers in the parking lot. These measures could have simply included observing Ms. McCool as she left the parking lot and ensuring that customers, including Ms. Cullum, were out of Ms. McCool's immediate path.”[8]

The Court held in favor of the Cullums, concluding, “Wal-Mart knew that a person was intoxicated and that the person would be driving her motor vehicle in the store's parking lot; therefore, it was reasonably foreseeable that she posed a specific danger to other [customers].” [9] Wal-Mart had a special relationship with its customer, Ms. Cullum, and therefore, it had a duty to protect her from foreseeable risks of harm on its property, such as Ms. McCool's drunk driving.[10]

This case gives potentially valuable insight into what a business owner's legal duties may be in order to avoid premises liability when his or her employees are aware of an intoxicated customer on business property. If store employees find themselves in a situation similar to that of *Cullum*, and the foreseeability and gravity of harm outweigh the burden on the business to engage in conduct that would prevent the harm, the employees should call the police and alert them of the situation and possible danger. Additionally, the employees should not actively *expel* the intoxicated customer from the store without undertaking *some reasonable* measures to ensure the safety of the other customers within the business premises, including in the parking lot. These measures, according to *Cullum*, could include calling the police, observing the intoxicated customer as he or she leaves the parking lot and ensuring that customers are safely out of the intoxicated customer's immediate path.

[1] *Cullum v. McCool*, 432 S.W.3d 829, 831-832, 2013 Tenn. LEXIS 1006, *4, 2013 WL 6665074 (Tenn. 2013).

[2] *Id.*

[3] *Cullum v. McCool*, 2012 Tenn. App. LEXIS 765, *4 (Tenn. Ct. App. Nov. 5, 2012). (Affirmed by The Supreme Court of Tennessee).

[4] *Cullum* LEXIS 1006, at 15-16, 2013 WL 6665074 (Tenn. 2013).

[5] *Cullum* LEXIS 765, at 4-5, WL 6665074 (Tenn. Ct. App. Nov. 5, 2012). (Affirmed by The Supreme Court of Tennessee).

[6] *Id.* at 12-14

[7] *Id.* at 14-15

[8] *Id.*

[9] *Cullum* LEXIS 1006 at 1, 2013 WL 6665074 (Tenn. 2013).

[10] *Id.* at 24