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Supreme Court of Texas.
Fifth Club, Inc. and David A. West, Petitioners,
v.
Roberto Ramirez, Respondent.
No. 04-0550.

October 18, 2005.

Appearances:

Timothy Poteet, (argued), Chamberlain & McHaney, Austin, TX, for petitioner.

Scott Steven Cooley, (argued), McGinnis Lochridge & Kilgore, L.L.P., Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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THE COURT ATTENDANT: The Court is now ready to hear argument in 04-0550, Fifth Club, Inc. and David A. West versus Roberto Ramirez. May it please the Court. Mr. Timothy Poteet for an oral argument for the petitioner. Petitioner have reserved five minutes.

ORAL ARGUMENT OF TIMOTHY POTEET ON BEHALF OF THE PETITIONER

MR. POTEET: Thank you. May it please the Court. I'm here representing the Fifth Club and David West. Today this case-- I'd like to outline our oral argument. To start with I'd like to address the exemplary damages issues because I believe that those are issues in this case to resolved and then we move to the direct liability, vicarious liability religious. I believe that the case today is issue of judgment for David West and, and no judgment of that damages for Fifth Club.

JUSTICE: Mr. West is a petitioner.

MR. POTEET: Yes, Your Honor. The issue is on the damages issues, a future mental anguish. I don't think I need to address that oral argument today must insure once, and I ask you that [inaudible]. There are three [inaudible] that I make their undispute; one is that there is no evidence within the history of violence by Mr. West to-- Mr. West was licensed, trained peace officer, and three he was not an employee

of Fifth Club. And I think those were issues, in fact all of the other issues that in fact the Court address. As to the prause negligence and exemplary damages points. Now, I'd like to make a, make a linear point. The, the respondents has argued that we have a challenge to liability finding against Mr. West, and so and there were-- we can't. They made a vicarious liability argument such as [inaudible] responsible for kind of damages while computer damages, as a result of Mr. West conduct but I want to point out the Court and the jury cannot decide Mr. West any [inaudible] of interest. It was It was zero by this name of computer damages. So we disagree with this vicarious liability that even if there were in that instance it will not have, it will not occur damages from this was a conduct to replace [inaudible]. It's our view that the, that the exemplary damages that were-- the trial court entered and the Court of Appeal affirmed, includes what the number of this Court opinions. The IJ's procedure states, [inaudible] versus Crown Central, [inaudible] versus Hilton, Southwestern Bill versus [inaudible], [inaudible] versus Silva. And the interest of KFC or maybe else but the court-- the trial court's opinion, first of all that was cover of the experts. But the Court of Appeals did not address the evidence purported to the clear procedural standard of review in which what statute require and what opinion in this Court have require and most recently in [inaudible] versus ADH, and Southwestern Mill versus Garson and further in reviewing that the Court of Appeals should have look, look all of this under decision C review has [inaudible] known for the appellant in this case.

JUSTICE: Somebody is part with know, it might be held-- it might be some evidence approximate?

MR. POTEET: If there is evidence in history-- if there were evidence at history of, of the following, I guess that, that's the beg the question of how, how much do you have to deal with that's not the rule of this case. How much do you to do to investigate someone? And I think clearly, under the reasoning of, of, of this court's opinion and legalize case and another contention that the court have. There's another appointment that the power including the independent contractor has some other issue. There's a, there's a-- they have knowledge about of, of problem. Now, with all this, employer has been a contractor have to do to find out that information. But if they have knowledge I think so.

JUSTICE: But you don't think that you have to look?

MR. POTEET: I don't think that in this court, there are two answer to that; the first answer is, in this case we, we project the suggestion by the respondent that we had our adverse in, we have no knowledge of this, of this individual, wait, wait, I say, in our opinion that is reasonable for Club owner who want, who wanted a peace officer. Did anybody use trained in such a way should handle the situation like this to a peace officer. So when they had this [inaudible] and they had the history of, of a business officer Hernandez to find [inaudible] ordinary updated of the police officer toward security. So they had that information and, and they, they had information that, that this was somebody who had a licensed peace officer. So, so to the extent a duty of inquiry as the Court describe it in Moore versus Roberts. I think that inquiry was accomplish and there was not in need -

JUSTICE: So school -

MR. POTEET: - anything more.

JUSTICE: - primary school is hiring a great school teachers. They could in trust that function to somebody else and tell Jo Smith, your

horror teacher course and do know this investigation under teacher who has been charged of the classroom of young children. Cause after all we did pick up. We intrusted that to somebody else. To somebody I pick up been lesser, been excessible [inaudible].

MR. POTEET: Maybe, maybe the question is, who was, who was Judge Smith? If we have, if we-- I don't know brought by and pick a new trial and ask him to do it, you know, that, that I present that -

JUSTICE: Before you paying, was Club paying in this officer could find another officer.

MR. POTEET: I'm not aware of any facts to that -

JUSTICE: With the analysis being different if West is not been a certified peace officer?

MR. POTEET: Perhaps, because I think that there's a key point having been a certified peace officer because it is reasonable and believing that he had trained to handled situation on its way.

JUSTICE: Well, it should, -

JUSTICE: But that -

JUSTICE: I'm sorry.

JUSTICE: Okay.

JUSTICE: That certified peace officer have been failed nad may have history of violence that could have been suspended and there maybe incident in certified peace officer background that would say to prudent employer that this is not a someone that should be providing security. That's not true.

MR. POTEET: That is true and certainly we feel it in the news how to open that peace officers. And the Court has spoke there duties as policeman and the results and do things that they shouldn't do.

JUSTICE: So does it satisfied the duty then simply to know that the officer that they're going to used to provide security as a peace officer or should they'll be additional investigation.

MR. POTEET: I think it does said so I do-- how high is your standard going to be? What we are going to require? How much in this investigation we are going to require or acquire and help, help the law the original [inaudible] we're going to impose his duty. If, if you have somebody don't work on your house and, and persons that would come in your entire life or contain-- and their, and the contractor. And there's going to do, you know, like they say, "Interior training of side of the track, the use of homeowner and the duty to believe, to call all the references, ask them for references and, and, call them." And I don't think the Court-- I don't think it's a matter of good public policy for the court to imposed those count to duties and, and I think that this of-- Justice Hecht has written in, in a descending order [inaudible] opinion that the court doesn't have a desire to the, to compete the reasonable used by businesses individual and the contractor. The, the outcome of this case is "person character exception" really seems to me to imposed rule liability, [inaudible] liability on the, the employer and in the contractor. And the employer of the, of an employee. One of the issues that, the that the lower court had address that the resolved cases like the, the Kinder versus Waterburger. And how to deal with a customer that they try, try [inaudible]. Now it's whether a used of force and scope, a force and scope employment -

JUSTICE: Well, it's a free to licensed and the manager won't take it all the delivery when they didn't fight for the store manager wasn't in the course of spell. So -

MR. POTEET: Yes, yes. That's, that's correct. And bounce in the club more likely to fight, it's going to be a course of scope and

somebody deliver free to -

JUSTICE: Well, that's, that's, that's an instinct point because that was characterize as a, as a bouncer. I wonder how this case should begin viewed as a or could be viewed if Fifth Club has recently call the police. If we, if we didn't have the individual there. And we have a guide where the evidence was. The doorman wanted more related in. And we get to know there's a police after all in this street, and wait the policeman after it to come. Is that make, is that make liable in that situation?

MR. POTEET: Certainly, as according people allow was a part of what he was there to do but this negligence-- I'm sorry, was liability, automatically suspicious liability waited that that "person character exception" was the basis for the Court of Appeals decision to really isn't a matter of strict liability to the hardworking of, of an independent contractor -

JUSTICE: Mr. Poteet, your not arguing officially, I mean before this Court, right? You dependent on that defense.

MR. POTEET: I'm sorry.

JUSTICE: Your no longer arguing officially in the date before this Court. Your banned in that defense.

MR. POTEET: With, with respect to the-- it's not the damage that I, I think that the decision was-- my decision was- that was too close. The back in use that was not resolved in this- and not incorporate into this Court. So as, as to West it's not an availment that the district court require.

JUSTICE: Well, there seems to be two or three phases after anyway just back to the "person character exception" that it is situation where protecting customers on your property that there should be some high standard of-- close nondelegable duty. What do you think? This is are some basis for good public policy reasonable.

MR. POTEET: This Court has never recognize for this "personal character exception" and it seems to have it's portion in the order of your case. In this way I would address that question which is to say, "This Court-- does this Court existing jurisprudence to meet whatever it need to exist with respect to that. We, we don't have an argument in this case that that this is an apparently dangerous activity that warrants nondelegable duty, strict liability. We have, we have a situation which the court, I think it address the issue, simply by applying it's, it's existing control jurisprudence and about that, I think there is a-- some confusion and perhaps that would be able to [inaudible] in my part pointing control that creates by vicarious liability and control that, that it can give rise to direct liability and the Court of Appeals said, like citing the Waltz case it said vicarious liability realize and there's substantial control set forth and, and in my brief I have to endorse that statement, looking out of the preparation of this argument that it is not read. That case was, was a-- when an employee case that was marvelous audience superior case. It was not like that Del Comp. versus Wright, and [inaudible] verus Speedwill. And number of the presented cases where a full-- there's control and then there's some traditional wrongdoing by the, by the heriot of independent contractor. And I'm arguing that we don't have that wrongdoing and I'm arguing that the Court of Appeals aired and citing as evidence of wrongdoing, and that's and nothing more than evidence of an independent contractor relationship. The Court and it's, and a block of text is-- was sent out in the brief of merits, list of some facts. I didn't take application within that guy was. I got train manual for inside guys, for it was follow by the outside guys.

Therefore, we we're negligence.

JUSTICE: Mr. Poteet.

MR. POTEET: Excuse me.

JUSTICE: Excuse me. My voice is some disappointing lost last night and a didn't make part in that -

MR: POTEET: I thought it was lost, too.

JUSTICE: I have to limit but how you said that is sure an increase of duty on your client about the fact that your client encourage your needs pay rate to come in your establishment and your client benefits from-- benefits financially from, from their visitation to your, to your club during the quest of duty and that instance to-- perhaps, to do a little bit more and determine whether or not the peace officer is in deed a peace officer. And that's a little bit -

MR. POTEET: My lights on the merits in response -

JUSTICE: Yes.

MR: POTEET: - every independent contractor is hard to deal with the court quest on duty for the person hired. So if, if that were the basis for disclosing liability on the heiro, and we do have strict liability cause everyone hired an independent contractor to provides some benefits to [inaudible] -

JUSTICE: Thank you Counsel. The Court is ready to hear argument on the respondents.

THE COURT ATTENDANT: May it please the Court. Mr. Scott was an [inaudible] of an oral argument on the respondent.

ORAL ARGUMENT OF SCOTT STEVEN COOLEY ON BEHALF OF THE RESPONDENT

MR. COOLEY: May it please the Court. My name is Scott Cooley [inaudible] in Austin Department. Counsel I believe-- I represent Roberto Ramirez and really I think a case about one thing, and that is the club such as cover them all and touches a little bit of justice within this [inaudible] who have parget to come to their establishment. Do I owe any duty whatsoever to protect those persons from harm?

JUSTICE O'NEILL: What is in this record-- is any indication of this type of [inaudible], I mean this term of pro se ability. Have they done to right that background check? What they found about this officer? You violated some, supposedly, minor ristraction at his employment that it is used to tell us-- I mean that would indicate this type of violence that was forceable.

MR. COOLEY: Sure.

JUSTICE O'NEILL: So even if presenting the duty that errs violence here, presenting the duty that they might inquiry, what such an inquiry prevail here?

MR. COOLEY: One thing would have prevail is that there was against the policy abuse in total to, to allow him to work. If would that -

JUSTICE O'NEILL: They have-- that was that foreshado this type of violence.

MR. COOLEY: It might not foreshadow this type of violence but what we have is an individual whose carrying a gun coming to the end to [inaudible] and we know had any inquiry been made that come to violate the policies of his work. He comes to-- it would have prevail that is your minor. Some minor probationary things that, that happen while you [inaudible] been in there a [inaudible]. It would have at least put to cover them all alert that you can't trust someone who would violate the

policies of their work would have -

JUSTICE: Same, same -

MR. COOLEY: - same past probation -

JUSTICE: - that would anybody would have a party to, to right? whether it would break the law Parkin. Are you willing that break the law?

MR. COOLEY: Except that we're talking about willing -

JUSTICE: I mean this is a Club have to work 1:00 AM, 2:00 AM, what time was the fight?

MR. COOLEY: Yes, your Honor.

JUSTICE: I mean you don't want a first great teacher out there. Do you?

MR. COOLEY: I don't.

JUSTICE: I mean you want somebody with-- you know, one bases. Why is-- I mean, you want a police officer.

MR. COOLEY: That's right. I do.

JUSTICE: And you know, there's a lot of reasons that police department have these rules but all police officers do these, lot of police officers don't like it, cause it that get into and you got-- you go out there but I'm being-- what, what possibly if the rule is-- if you ever broken a rule you can't have any bouncers in Club, right?

MR. COOLEY: I don't think the rule should be that. I think the rule should follow the law which has been for that case that the employer when hiring an independent contractor has a duty of care. Did they satisfy the duty of care here? No. You may -

JUSTICE: I'm sure, you don't want a police officer that comes on the video tape like you did on ride the [inaudible] within this most recent day that was on your arms right?

MR. COOLEY: You don't want that.

JUSTICE: Now, would you find that help but not for background check.

MR. COOLEY: I don't know that you would but all were asking for his to satisfy the standard of care. That's what the jury in this case would ask. Were they negligence? The answer is, "yes," because -

JUSTICE O'NEILL: How was this case different from our-- I think it was corporal A be permanent case where a child who residing in the apartment building went home to to trace something from his home and was actually left him along the way. And the argument was made that a form that groundcheck was not made on a tenant. And the direct of appeal that he had some minor infraction along and the court said, "There was nothing." If his background even if the third check had been made they would indicate that this type of activity could occur. How was this analysis any different in this -

MR. COOLEY: The difference are-- we're not talking about the tenant, we're talking about someone that Mr. Seylum trusted as Justice Christy pointed out he carry a gun to come to this establishment, to protect the establishment, to protect its fitrums and what Mr. Seylum did was tell a third party, "We want you to hire some law enforce and that's it."

JUSTICE O'NEILL: I still don't understand the distinction between that case.

MR. COOLEY: The distinction is -

JUSTICE O'NEILL: Does is the duty your seeking to imposed is, is not enough of the background check. It would reveal something. And I think that the holding of that case was-- if there's nothing that would have been reveal. There could be in approximate cause.

MR. COOLEY: We're trying to-- your Honor, that imposed judge is

not a duty to do, to do background checks. We want to show this Court that there is a standard of care, an ordinary care that Fifth Club needed to meet. And it could be on a continue, it could be making a phone call yourself is David West an employee of your police department and taking it from there. Judge keep -

JUSTICE: Have you given us your best evidence for approximate cause?

MR. COOLEY: I'm afraid that I have. All I have is just this case. Keep, keep saying if you would call, I would have said, "No, he cannot work there." It's against our policy for him to a) not to fill out application with us for outside employment, and b) to work at a place deserved alcohol. Now, Justice Kip, Kip in-- Kip, Kip on justice on the way it is. Kip, Kip also said, "When it testified an amount of proof, I guess, there were problems with David West background. It was enough to show that Kip, Kip knew that there was a possibility of problems, sure, and that you would disallow the employment.

JUSTICE: But it was okay with the [inaudible] ground to work on the college campus but not in public.

MR. COOLEY: It was that there is a distinction between when talking about late at night in Maines that says, we're talking about alcohol where contention are high for whatever reason, Yes, Judge, you can tell us and said, it was okay for you to work for us? I think that was in the record. It's about-- that's not a situation when, when to used and tell us the procedural -

JUSTICE: But it's not specific jury finding on the application on this "personal character exception" was there. The jury didn't find -

MR. COOLEY: The jury did not have person character question in that. What it had was a fundamental control. And so, vicarious liability on the Fifth Club mark the evidence to that was the pertinent for a mission for Fifth Club. And that race is for distinction because there are two ways to get there in this case. The first one is strictly negligence of Fifth Club. Now, I don't like to have dicuss in that matter. And I'm not going, I'm not going to say, I'm not saying to set down, negligence in that. And you been click there but the fact is, you know our position. We feel alike. The duty, the standard of care was violated. They didn't do anything end of the story. Had they done something. She keep that it could have disallow the employment. It has some history. It was forceable that a problem could have a reason. That's our position.

JUSTICE: I just want to comment before you live. Was there anything in the record about whether police department respond the alleged was sort of inquiry to general as opposed to this campus police department. Can you call up the police department and say, I'm still hiring officer general of the great traffic. This-- can you tell me what the embodiment with that I would, I would expressly I will response to that. I just wonder if there's anything in the record.

MR. COOLEY: Well, there is a testimony from, from Marlon Mores, an expert that we wanted too, he said, "yes" this is a standard type of thing. You have to make the phone call. And you find out what you going to find out and that he say that specifically Chief Kip, yes, would have said, "Sorry it's a problem I can't include this guy, you know, but was it's a common in this arena to do that?" Yes. Officer Paine also testified to the same thing. That's the standard procedure is to call-- just at least make a phone call to find out if the guy is who says, he is. Is he, in fact they licensed peace officer. Is he in good standing with your-- with his employer? In this case, you used to tell us -

JUSTICE: We move on to the a-- one other question.

MR. COOLEY: Yes, your Honor.

JUSTICE: If the phone call that reveal the officers miss lot of work. They had an eating disorder. He miss a lot of work. He violates the policy of his employer about missing a lot of work. With that I have satisfied the-- that is a sufficient nexus to give Club some indication that he was a problem. He said all they have to do was make the phone call. Is that all?

MR. COOLEY: Well, again, I don't think it's a about line rule. They need to satisfy the standard of care whether it's an application with references that then leaves them to take the next step and call the employer-- call the common employer whether it is-- you and me reference check are form of background check reference. Which we're not asking to do but, again, there's a continual and it's up to the jury to decide did what they did to satisfy the duty of ordinary care. And the answer is, "No." Would they discover? Would it equip the Club on alert if you had an eating disorder.

JUSTICE: Probably, not.

MR. COOLEY: But would it have put among alert if, if he constantly miss the work. And that he needed someone to do it reliable because at 1:00 AM he takes the fifteen minutes for the cup of [inaudible].

JUSTICE: Yeah, that would have -

MR. COOLEY: - that would have been some indication that my captain was-- this guy was not fit to be a security guard. Would this be indicated that he would break someone's skull, maybe not. Would it got, would it raised the red flag, my answer to that is "yes."

JUSTICE: Your going to move on to control it.

MR. COOLEY: Well, the result of that is because there are two ways. One is-- just the negligence the Fifth Club. It doesn't involved the person character analysis or the control analysis. And the second, is vicarious liability. And I want to clarify, we are not saying that David West have kind of damages against him because it clearly did not. However, there was analysis finding. There was negligence assault, gross negligence analysis against David West. The damage of our affirmative was zero against Mr. West but Fifth club was jointly and certainly liable for the entire amount of actual damages against Mr. West which is about \$38,000. And that, it was liable for another \$50,000 for himself, on its own. What the vicarious liability analysis does is, is-- it at least get us to David West's actions which result negligence-- gross negligence analysis. And then, question number 22-- damages question said, "What would compensate Mr. Ramirez for these damages?" And that's were we get a \$100, 000. It was not broken down between the various act by the various perpetrator in this case.

JUSTICE: Stop, you out there. And you said that the two liabili-- ways in getting liability here, that the negligence in the Fifth Club, and then the vicarious liability. So negligence does not include the "person character exception." Are you saying here that your not relying upon "person character exception?"

MR. COOLEY: I'm not saying it now. We think that, that does get-- this club on the book or what the case is directly hears. It is said, "It is your complaining someone in and a contractor to protect your property, to protect those who come to your property. You can be reliable for the intentional torts of the -

JUSTICE: Intentional term liability. You said there were two presented here. Is there having a third there?

MR. COOLEY: NO, no Sir, I mean, that's an evidence in two words vicarious liability. And so -

JUSTICE: There's no, really, there's no different between the person character in a radic control.

MR. COOLEY: Well, I think, I think there is because the radic control can apply the situation when it wasn't necessarily of a personal nature, right?

JUSTICE: The result of person character is as a matter of law it control everything. A bouncer does.

MR. COOLEY: I'm, I'm not sure to agree with that, I mean, maybe from a thirty thousand prospective that's what it is. But their policy was behind the "personal character exception" that Justice Medina touches this along. It just that having person coming into your establishment for what your trying to get financial gain. That was the policy that jury court found in favor of "person character exception."

JUSTICE: But it-- as I understand the person character exception, your liable for anything to do in the course of your employment. You can [inaudible] in an independent contractor.

MR. COOLEY: I agree.

JUSTICE: So you in effect your saying, you control everything that come in the contractor does. One we need special rule for that. What's wrong with the Thick Well Shallow versus Kean in general rule if you control it. And your liable for but in the following cases we, we don't care whether you control or not. We're going to deem you to have to control it.

MR. COOLEY: Right. It's a good strat. I think that person character-- I see where you going. Well, person character would encompass control, control when it was necessarily to encompass person character because you don't always have person character of the employment that issue but I think they both get of the same place. And that is vicarious liability and the question in regender, the question in cases on control is do they control some? -

JUSTICE: If the difference is to register of that case. Person character is not, that's the court, Christy court case -

MR. COOLEY: See I'm not -

JUSTICE: Austin court, and the question is, "Do we, do we set over and over and over and pick a contractor?" Only liable for what they do if you control it. And now, your asked to settle this side and adopt an expanded rule that says, as a matter of law in the following occupations you control.

MR. COOLEY: I, I don't -

JUSTICE: - which-- I don't think there's any bouncer in that list. Do you?

MR. COOLEY: No, your Honor. I don't agree -

JUSTICE: Why do we need that bouncer rule for independent contractors?

MR. COOLEY: This is-- is this the most dangerous job in the state a bouncer as proba -

JUSTICE: You know, there are people you cannot-- there are people you can hire, they can don more than as a bouncer. Right?

MR. COOLEY: Sure like an off duty peace officer has back on me. And -

JUSTICE: How about, how about he -

MR. COOLEY: Independent contractor to ran your Nuclear Power Point. Is that rather dangerous about. I mean, there's a long list of these person character to start down the road of but this is a dangerous job. It maybe a long list.

JUSTICE: But it doesn't matter what risk to public that has-- when you determining whether or not this apply in our -

MR. COOLEY: It doesn't matter what risk it's cover, it matters how much contractors that people would have with the public where the nuclear power plant operator contacted a contractor, probably not really been packing me, probably not. Maybe dealing with volunteer situation, probably not, and volunteer involving human, alcohol late at night that sort of thing. But I want to touch on some-- I don't think that this would be the first time that this Court will recognize "person character exception," not in call you that in Texas in Pacific Rail versus HangingGlove which only give you the cite 247 it's in our brief, 247 that was an 236 and with that was-- there was a case where two employees one is in the contractor, one employee of the Readley Company. Essentially got into a fight after that any contract that used different kind of steal in some things. This Court said, "The nature of the employment made is such a necessary to involved the time, the used of forced as with the employees duty is to guard the employers property in protective from trespassers, talk the act, using force maybe part of the employers business making them liable even in greater force is used than necessary. That's 1952, from this Court. It did not call it as a "personal character exception" but that's clearly, what was an issue in that case. Now, the court didn't find that it apply because they don't personal in a mosque between independent contractor and the employee. That was not the situation here. It was not of any history between these two. The Court of Appeals pointed it out, that this analysis of person character exception and it was so good indeed the first time that this Court went down into that road. It recognize that rule of law for 54 -

JUSTICE: What are you talking about control, talking about control-- under what specific evidence that have been this record demonstrate the Club directed help security from job.

MR. COOLEY: Well, the first thing he did was to tell the Morris thing. He told them where to be, they told them what they needed to be done. And I agree that telling the general description is not enough but they said when it is time for you to come in either direction we move someone. We are deciding on why he need to be remove. We're deciding the level of urgency. We used our flashlight to get you here. You come in then we tell you exactly who is it. We tell you to remove that person, remove him because he was doing -

JUSTICE O'NEILL: I don't-- we don't tell them how to do that. So I mean, how's that took from a general contractor saying, "Class that will-- we need it done in two-day." Like this -

JUSTICE: So it's different from hospital and tell the doctor coming here in an emergency rate. Do I call -

MR. COOLEY: I think it's a different because it's not as simple as giving the direction. It's telling them who he is? Why they need to do it? And to do it now, to do it later. To what extent they need to do it do they need to just ask go until the door. That they need to take him outside and call the police it, it goes level upon level, upon level. It's not at the same, it's the Ross case where there were a contract that said, here's all we want you to do a security guards. Now, go to it and then we turn on at, it's different. It takes it a step further and it -

JUSTICE O'NEILL: What did they do here? As I've say, remove his body.

MR. COOLEY: They decided that he need to remove for one thing. They call then the officers. They told the officers to remove him. They had specific methods into.

JUSTICE: Yes.

MR. COOLEY: They had some specific policies for how was this supposed to be done by inside security that they did not show to outside security. And that it goes to the-- first of all the transfer of the activity from the objective viewpoint is their extreme wasn't harm, the answer is "yes." They have all issues for inside people to know exactly what to do. Subjectively, the fact that they have that shows that Salem Salam, the man who testified in this case on behalf of Fifth Club knew exactly what was going to need to be done by inside security and outside security. But it just not to have any involvement, whatsoever, after the phone call to call Hernandez to say hire this people. And on his cite, they control what and when it happen, end of the story.

JUSTICE: Thank you counsel.

MR. COOLEY: Just a few points. First of all I've, I heard in that argument of against the rule, rule confusion between-- by vicarious liability the result of control and the distribution that would like to control is-- I, I think this Court-- jurisprudence is that in the independent contractor situation if the control force required there has to be some negligence for liability to follow and that when there's independent contractor vicarious liability does apply in that and follow as a result of some exercise in control by-- of apply to work. Here, there's not a negligence flashlight issue, I don't think, ask him

JUSTICE: Yeah, but-- What prior to this agreement, what was this?

MR. COOLEY: I mean, my, my experience in criminal law. Everything happen between midnight at 2:00 Am of Friday at Saturday night. That was almost of a crime for committed, you wanted to come to the Club but people get drunk and then they erred at this time at night, likely, you know, there's going to be criminal activity. At least who you find out the parking lot.

JUSTICE: So of course, you don't hire an employee to watch it cause that what would give suit. You hire independent contractor in just a way to make sure that whoever cracks that hands is the judgment proved.

MR. COOLEY: I think so. That's seems to be what animates this "person character exception" to start with. Would that New York case.

JUSTICE: Do you agree we don't want -

MR. COOLEY: We don't want the law to encourage people to hire hitcrackers so that the people would crack hands, would be able to recover.

JUSTICE: I agree with that but I think what they did in this case was not to hire a cracker. They hire a train police officer. And I think that's the good thing on that day.

JUSTICE: And of course, the reason I did that rather than on the Sunday school teacher. They going to be fights in -

MR. COOLEY: Well, that's supposed to -

JUSTICE: - sense of requirement -

MR. COOLEY: And that's maybe legitimate but I would say, the reason I do that is not because he has a soft that kind of fight but becuase instinctively he has been trained to handle the situation with, with resist repeat and that's, that's the good thing that I would say, again, we do policeman do that things sometimes. Here does not the evidence in the record of Mr. West, had done anything bad. That would. That would in anyway it indicate that this, that this again was going to occur here. That there was no notice -

JUSTICE: Prominent, economic prospective. Why is it on your property? We should have a rule that says, you can't give a "read of

life," this kind of liability.

MR. COOLEY: Well, that, that's sounds like bouncer rule and, and, and -

JUSTICE: No, I mean how about Wal-Mart, I mean, you know, I mean it stores a truck, assault in magrecence stop light. And then should we allow Wal-Mart, to say, "A track-- a hundred of people made it night 24 hours. And then that this claim was anything happen-- what rubbery happen in the Parkin Lot disabled, of course, that was our employee. Yes. What would be-- what the rule that says, "Look it's your property, it's your business, your liable independent contractual or not."

MR. COOLEY: That's a, that's certainly a policy decision that the court can make. I just want to be aware where is that drawing a line, opposing the liability on heiro in the contractors that is one of the - it's going to be Wal-Mart because they have some benefits, it's a big business, they had some benefits. They had someone there to protect of their property. [inaudible] I'm actually that exactly going on here. The Fifth Club has an obligation not to let withdrawn since-- so, so that the, the-- there's a change of difference there that I perceived that this is a matter. Have someone there that and you need in not being able to display their liability when they do something bad. And that's the policy, policy decision for the court to make and that, that rational has being spell out in, in earlier for cases. And that's why we do this. We spread the liability, by liability in terms of set forth.

JUSTICE: We're, we're going to fall the line.

MR. COOLEY: In the contractor when it comes into your house also provide the benefits to you other than-- beside the benefits of the character within it, what the difference?

JUSTICE: We disagree that the body secured in a club like this is an apparently dangerous activity.

MR. COOLEY: I do disagree. Thank you very much.

JUSTICE: Thank you that conclude the argument and the court will now take a brief ...