ANSWER TO QUESTION NO. 11

In order to make out a prima facie case of negligence, a plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) causation, and (4) damages. *Brown v Brown,* 478 Mich 545, 552 (2007). The existence of a legal duty is a question of law. *Valeaniant v Detroit Edison Co,* 470 Mich 82, 86 (2004). "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Brown,* 478 Mich at 552. Duty requires the defendant to conform to a specific standard of conduct in order to protect others against unreasonable risks of harm. *Maiden v Rozwood,* 461 Mich 109, 131 (1999); *Rakowski v Serb,* 269 Mich App 619, 629 (2006). Policy factors to consider in determining whether a duty should be imposed include the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. *In re Certified Question from Fourteenth Dist Court of Appeals of Texas,* 479 Mich 498, 508 (2007).

Johnson's claim against Smith: With respect to injuries occurring between participants in a recreational activity, the Supreme Court has held that proof of negligence is not enough to maintain a suit for personal injuries. Specifically, in *Ritchie-Gamester v Berkely,* 461 Mich 73 (1999), the Court adopted "reckless misconduct as the minimum standard of care for co-participants in recreational activities." In *Behar v Fox,* 249 Mich App 314, 319 (2001), the Court of Appeals held that:

"Our Supreme Court has previously defined reckless misconduct as follows:

"'One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong. The only respect in which his attitude is less blameworthy than that of the intentional wrongdoer is that, instead of affirmatively wishing to injure another, he is merely willing to do so. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another, being indifferent whether it does so or not.' *Gibbard v Cursan,* 225 Mich 311, 321; 196 NW 398 (1923), quoting *Atchison T & SFR Co v Baker,* 79 Kan 183, 189-190; 98 P 804 (1908)."

In light of *Ritchie-Gamester,* the applicant should indicate that the duty placed on participants in the soccer game was to not act recklessly. *Ritchie-Gamester,* 461 Mich at 95 ("co-participants in a recreational activity owe each other a duty not to act recklessly"). Using that definition from above, the applicant should discuss whether the evidence shows Smith violated that duty. In doing so, the applicant should recognize that some of the witnesses heard Smith use a profanity towards Johnson just before he turned and intentionally elbowed Johnson. That evidence of intentional conduct would create a factual dispute with the evidence that it was merely an accidental elbowing. The jury would decide who to believe, and so Johnson might be able to establish the breach of duty element of a claim against Smith.

The remaining elements of causation and damages are easily shown under these facts. Proximate cause is defined as "that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which injuries would not have occurred." *Helmus v Dept of Transportation,* 238 Mich App 250, 256 (1999). The applicant should recognize and briefly discuss that fact that the elbowing caused the injuries and the injuries appear to be significant.

Jones's Claim Against WASI: In addressing any possible negligence claim against the property owner, an applicant should first determine what duty was owed to the plaintiff. The first step is to determine the status of the plaintiff, and from the facts we know that plaintiff was an invitee as she paid for a ticket. *Benton v Dart Properties, Inc,* 270 Mich App 437, 440 (2006).

Second, the applicant must determine what duty is owed an invitee by a premises owner. In general, a landowner owes a duty to an invitee to take reasonable steps to ensure that the premises are reasonably safe, and must warn an invitee of unreasonably dangerous conditions or dangers known to the landowners but unknown to the invitee. *Lugo v Ameritech Corp Inc,* 464 Mich 512, 516 (2001). Here, however, we are addressing a more specific duty, that is, what duty is owed to an invitee to protect them from criminal acts occurring on the premises. That issue was addressed in *MacDonald v PKT Inc,* 464 Mich 322, 335-336 (2001), where the Court held that a premises owner has a duty to invitees to respond reasonably to specific occurrences on the premises:

"A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to assume that others will disobey the law. A merchant can assume that patrons will obey

the criminal law. See *People v Stone,* 463 Mich 558, 565; 621 NW2d 702 (2001), citing Prosser & Keeton, Torts (5th ed.) §33, p 201; *Robinson v Detroit,* 462 Mich 439, 457; 613 NW2d 307 (2000); *Buczkowski v McKay,* 441 Mich 96, 108, n 16; 490 NW2d 330 (1992); *Placek v Sterling Hts,* 405 Mich 638, 673, n 18; 275 NW2d 511 (1979). This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.

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"Having established that merchant's duty is to respond reasonably to criminal acts occurring on the premises, the next question is what is a reasonable response? Ordinarily, this would be a question for the factfinder. However, in cases in which overriding public policy concerns arise, this Court may determine what constitutes reasonable care. See *Williams, supra* at 501, citing *Moning v Alfono,* 400 Mich 425, 438; 254 NW2d 759 (1977). Because such overriding public policy concerns exist in the instant cases, the question of reasonable care is one that we will determine as a matter of law. *Williams, supra* at 501. We now make clear that, as a matter of law, fulfilling the duty to respond requires only that a merchant make reasonable efforts to contact the police. We believe this limitation is consistent with the public policy concerns discussed in *Williams.*"

Thus, the applicant should recognize that WASI's duty is to respond reasonably to criminal situations that occur on the premises. In particular, the applicant should indicate that, given the circumstances of an unruly crowd and an incident on the field, WASI should have been aware that the fans could be in danger. Indeed, WASI's manager did contact the police because of the increasingly tense situation, and that is all that is required. WASI had no further duty to protect Jones from the criminal assault and battery committed upon her. That the injury occurred before police arrived does not mean that the duty was not fulfilled. No breach of duty exists, and Jones cannot establish the elements of a negligence claim.

Finally, if the applicant comes to this conclusion, the rest of the negligence elements are not necessary to discuss. However, if an applicant concludes that a duty was breached, the applicant should engage in a discussion about the final two elements, i.e., whether the breach was the proximate cause of the injury, and whether Jones suffered damages. The first issue--proximate cause--should entail a discussion of what constitutes proximate cause and whether the failure to protect Jones proximately caused her injuries. As noted in the first answer, proximate cause is defined

as "that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Dept of Transportation,* 238 Mich App at 256. In order to render a negligent act a proximate cause of an injury, it is not necessary that the particular consequences or injury or the particular manner in which it occurred might have been foreseen, if, by the exercise of reasonable care, it might have been anticipated that some injury might occur. *Oestrike v Neifert,* 267 Mich 462, 464 (1934); *La Pointe v Chevrette,* 264 Mich 482, 491 (1933); *Baker v Michigan Cent R Co,* 169 Mich 609, 618-619 (1912). In other words, where the exact consequence of the negligence may not be foreseen, if some injury was reasonably foreseeable as a probable consequence of the conduct or omission involved, it is actionable. *Oestrike,* 267 Mich at 464-465. An argument could be made that the punch was unforeseeable, though a counter argument can be made that some injury was foreseeable because of the unruly nature of the crowd. The better argument is that it was unforeseeable. Finally, the applicant should readily conclude that Jones suffered damages.