[Cite as *Pugh v. Ned Peppers,* 2010-Ohio-1917.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

HERBERT PUGH, et al.	:	
	:	Appellate Case No. 22939
Plaintiff-Appellees	:	
	:	Trial Court Case No. 04-CV-6897
v.	:	
	:	(Civil Appeal from
NED PEPPERS, et al.	:	Common Pleas Court)
	:	
Defendant-Appellants	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 30th day of April, 2010.

. . . . . .

JOHN J. DANISH, Atty. Reg. #0046639, by JOHN C. MUSTO, Atty. Reg. #0071512, City of Dayton Attorney's Office, 101 West Third Street, Post Office Box 22, Dayton, Ohio 45402
Attorney for Plaintiff-Appellee, City of Dayton

R. GARY WINTERS, Atty. Reg. #0018680, McCaslin, Imbus & McCaslin, 632 Vine Street, Suite 900, Cincinnati, Ohio 45202
Attorney for Plaintiff-Appellee, Colony Insurance Company

JOHN J. SCACCIA, Atty. Reg. #0022217, Scaccia & Associates, LLC, 536 West Central Avenue, Second Floor, Springboro, Ohio 45066
Attorney for Defendant-Appellants Ned Peppers, et al.

. . . . . .

FAIN, J.

{¶ 1} Appellants Ned Peppers, Inc., Mark Schaefer, and Mark Luttrell appeal from a summary judgment rendered against them on their third-party complaint filed

against the City of Dayton and Colony Insurance Company. Appellants contend that the trial court erred in rendering summary judgment against them, because they established genuine issues of material fact sufficient to withstand summary judgment.

{¶ 2} We conclude that the trial court did err with regard to its decision to render summary judgment on the appellants' 42 U.S.C. § 1983 claims based on the city's post-2003 objections to a liquor license, because the trial court incorrectly determined that the appellants could not maintain those claims. However, we conclude that there was no genuine issue of material fact with regard to the remaining claims, and that the trial court did not err by rendering summary judgment on those claims.

{¶ 3} Finally, we conclude that the trial court did not err in rendering summary judgment for Colony Insurance upon the third-party plaintiffs' claim that Colony had a duty to defend and indemnify them with respect to claims for bodily injury by agents of the Ohio Department of Liquor Control injured in the third-party plaintiffs' bar. Although the third-party plaintiffs claimed that they and their employees were merely defending themselves and their patrons, this would still have been excluded from coverage under a provision excluding claims for bodily injury or property damage arising from: "The use of any force to protect persons or property whether or not the 'Bodily Injury' or 'Property Damage' was intended from the standpoint of the insured or committed by or at the direction of the insured."

{¶ 4} That part of the judgment of the trial court rendering judgment against appellants on their post-2003 claims under 42 U.S.C. § 1983 is Reversed, the

judgment is Affirmed in all other respects, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 5} Ned Peppers, Inc., d/b/a Ned Peppers, is a bar located in Dayton's Oregon Historic District. The business, which has been operated since 1994, is owned by James Schaefer and Mark Luttrell.[1]

{¶ 6} On April 23, 2003, the City Commission of Dayton passed a resolution objecting to the renewal of a liquor license held by Ned Peppers, Inc. The objection was based upon a recommendation made by the Dayton Police Department, which was, in turn, based upon an investigative report made by Dayton Police Detective Michelle Moser.

{¶ 7} According to Moser, she has the responsibility for "conducting the annual liquor permit renewal investigations for the City of Dayton Police Department from information sent from district Commanders." Her 2003 investigation of Peppers led her to determine "that the operation of the bar had a serious detrimental effect on the [surrounding] neighborhood and a drain on Police services." Moser further "concluded that there were disproportionately high numbers of calls for police assistance to the bar, including numerous assaults."

{¶ 8} On September 5, 2003, Peppers, through its owners James Schaefer and Mark Luttrell, entered into a "Memorandum of Understanding" with then Dayton

[1] For ease of reference, we will refer to the business, Schaefer and Luttrell, collectively, as Peppers.

Police Chief William McManus. The Memorandum indicated that McManus met with Schaefer and Luttrell after the passage of the resolution to "address the problems that are occurring as a result of the operation of [the bar]." The Memorandum also indicated that as a result of the representations made by Schaefer and Luttrell, McManus "withdrew the Dayton Police department's objection to the renewal of [the] liquor permit and recommended that the [City's] objection filed with the Division of Liquor Control be withdrawn."

{¶ 9} The Memorandum, which was signed by McManus, Schaefer and Luttrell only, went on to state as follows:

{¶ 10} "In order to facilitate the withdrawal of the City's objection, it is necessary to memorialize our agreement in writing. The City is willing to notify the Division of Liquor Control that the objection is being withdrawn, on the condition that you, the shareholders of Ned Peppers, Inc., agree to take the following actions:

{¶ 11} "1. Add additional security inside the liquor establishment to eliminate as much as possible the incidents occurring inside the establishment. Contracted private security or additional employees of the establishment can provide the security.

{¶ 12} "2. Provide security for the parking lots in the rear of the liquor establishment to eliminate as much as possible the incidents occurring in those parking lots. Contracted private security or additional employees of the establishment can provide the security.

{¶ 13} "3. Discontinue any discounted alcoholic beverage sales, including, but not limited to, happy hour specials, lady's night specials, and event specials.

{¶ 14} "4. Discontinue sales of alcoholic beverages to customers who appear to be intoxicated and contact the Dayton Police Department if those customers are unable to care for themselves.

{¶ 15} "5. Report all criminal activity occurring inside or outside the liquor establishment to the Dayton Police Department and cooperate with all investigations by the Dayton Police Department.

{¶ 16} "6. Organize and take all necessary steps to implement a community policing (COPE) partnership between the business owners in the Oregon District, the Dayton Police Department, and residents of the Oregon District.

{¶ 17} "The Dayton Police Department and the community will continue to monitor your establishment. If you fail to comply with the items agreed to herein, if you violate any laws of the State of Ohio or the City of Dayton, or if the problems at your establishment continue or recur, the Dayton Police Department and the City of Dayton will consider objecting to the renewal of your liquor permit in the future."

{¶ 18} Thereafter, on October 26, 2003, an incident occurred in the bar during which agents with the Ohio Division of Liquor Control claimed they were physically assaulted by two Peppers' bouncers. Criminal charges were filed, but the bouncers were ultimately acquitted.

{¶ 19} On November 13, 2003, McManus sent a letter to Schaefer and Luttrell informing them that, due to the October incident, the bar was deemed to have failed to comply with the terms of the Memorandum of Understanding. The letter further noted that McManus would recommend that the City pursue the objection to the liquor license renewal.

{¶ 20} The two Liquor Control agents eventually filed a civil suit against Ned Peppers, Inc., Schaefer and Luttrell, who in turn filed their own claims against numerous entities. Of relevance to this appeal, Peppers filed a third-party complaint against Colony Insurance Company (hereinafter "Colony). The business was insured under a Commercial General Liability Policy at the time of the alleged assaults. Peppers sought a declaratory judgment that Colony owed it coverage and a duty to defend regarding the assaults under the terms of the policy.

{¶ 21} On July 26, 2005, Peppers filed a motion to amend, seeking to add claims and defendants. Of relevance hereto, Peppers added the City of Dayton as a defendant. The complaint set forth claims for violation of Peppers' civil rights pursuant to 42 U.S.C. §1983, R.I.C.O. violations, breach of contract, bad faith, equitable estoppel, promissory estoppel, negligent misrepresentation, quantum meruit, intentional and negligent infliction of emotional distress, failure to supervise, tortious interference with business contract, and civil conspiracy.

{¶ 22} Both Colony and the City filed motions for summary judgment. The trial court found that Colony did not owe a duty of coverage or a duty to defend Peppers, because the assault on the agents was specifically excluded by the terms of the policy of insurance. With regard to the claims against the City, the trial court rendered summary judgment against Peppers on its 42 U.S.C. §1983 claims, solely upon the finding that Schaefer, Luttrell and the bar were not members of a protected class. The trial court also found that the claim of breach of contract against the City could not survive, because the Memorandum of Understanding did not bind the City. Finally, the trial court found that Peppers could not bring a promissory estoppel claim

against the City, because the City was performing a governmental function.

{¶ 23} From the summary judgment rendered against it, Peppers appeals.

II

{¶ 24} The First and Second Assignments of Error state as follows:

{¶ 25} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT FOR REASONS NEITHER RAISED EXPRESSLY OR BY IMPLICATION IN SAID MOTION NOR ADDRESSED BY IMPLICATION OR CONSENT OF THE PARTIES.

{¶ 26} "ASSUMING, ARGUENDO, THE APPELLANTS ARE NOT TECHNICALLY A PROTECTED CLASS AND FURTHER ASSUMING, ARGUENDO, THE CITY RAISED THE PROTECTED CLASS ISSUE IN ITS MOTION FOR SUMMARY JUDGMENT THE TRIAL COURT STILL COMMITTED PREJUDICIAL ERROR BY FAILING TO RECOGNIZE THAT THE APPELLANTS ARE A CLASS OF ONE."

{¶ 27} In this assignment of error, Peppers contests the trial court's determination that since neither Schaefer and Luttrell, as the owners of the bar, nor the bar as a business, are members of a protected class, their equal protection claim must fail. Peppers argues that this issue was never raised by the City and that, even if it had been, the trial court's finding was incorrect.

{¶ 28} "Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try." *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358, 1992-Ohio-95. "A party seeking summary judgment must specifically delineate the basis for which summary judgment is sought in order to

allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 116. Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1.

{¶ 29} In its motion for summary judgment, the City argued "[t]here has been no constitutional deprivation. Not only are Ned Peppers' claims barred by the statute of limitations, but Dayton has not deprived Ned Peppers of any constitutional rights. The City merely used its rights to object to a liquor renewal permit. The number of complaints and police calls to the bar were more than sufficient reason to object to the permit."

{¶ 30} After Peppers filed a memorandum in opposition, the City filed a reply brief in which it stated: "Peppers failed to allege membership in a protected class. Moreover, Ned Peppers is owned by two while males that are not subject to membership in a protected class. As such, Ned peppers' §1983 claims fail."

Peppers did not file any other pleadings with regard to the motion for summary judgment.

{¶ 31} In rendering summary judgment against Peppers, the trial court stated as follows: "Regarding [Peppers'] equal protection claim, the Court finds that Ned Peppers is not a member of a protected class. The owners are white males. Further, Ned Peppers as a business is not a protected class."

{¶ 32} We agree with Peppers that the City failed to raise the protected class issue in its motion for summary judgment and that the trial court therefore erred by rendering judgment on that basis.

{¶ 33} We further find that the trial court erred with regard to its finding that the equal protection claim is barred due to the fact that Luttrell and Schaefer and the business are not members of a protected class.

{¶ 34} As a general rule, "[a] person bringing an action under the Equal Protection Clause must show intentional discrimination against him because of his membership in a particular class, not merely that he was treated unfairly as an individual.' " *Hill v. Croft,* 10th Dist. No. 05AP-424, 2005-Ohio-6885, at ¶ 16. (Citation omitted.) "A 'class of one,' however, may appropriately maintain an equal protection claim where the plaintiff alleges both that the state treated the plaintiff differently from others similarly situated and that no rational basis exists for such difference in treatment." *Meyers v. Columbus Civ. Serv. Comm.,* 10th Dist. No. 07AP-958, 2008-Ohio-3521, at ¶ 18. (Citations omitted.) In an equal protection claim, government actions that affect suspect classifications or fundamental interests are subject to strict scrutiny by the courts. *Eppley v. Tri-Valley Local School Dist. Bd. of*

Edn. 122 Ohio St.3d 56, 59, 2009-Ohio-1970, ¶ 14, citations omitted. In the absence of a suspect classification or fundamental interest, the state action is subject to a rational basis test. Id.

{¶ 35} We note that on this record, it appears that neither Schaefer nor Luttrell is a member of a protected class. Furthermore, the right to hold a liquor license is not a natural or fundamental right. *Lewis v. City of Grand Rapids* (1966), 356 F.2d 276, 286. This fact does not, as the trial court concluded, bar them from pursuing an equal protection action. Rather, their status as an unprotected class without a fundamental interest at issue merely indicates that any State action will be subjected to a determination of whether it meets the least-strict "rational basis" standard. Therefore, we conclude that the trial court erred by rendering summary judgment on this issue.

{¶ 36} The City urges us to affirm the trial court's decision on other grounds. Specifically, it argues that the equal protection and civil rights claims against it are time-barred by the two-year statute of limitations applicable to §1983 actions. See, *Nadra v. Mbah,* 119 Ohio St.3d 305, 2008-Ohio-3918, ¶ 31. Conversely, Peppers contends that the action was timely filed, and that each subsequent objection to the renewal of their liquor license created a new cause of action.

{¶ 37} Peppers' argument with regard to its 42 U.S.C. §1983 claims appears to hinge upon the contention that the City acted with malice in objecting to the renewal of the bar's liquor license. Specifically, Peppers intimates that the neighborhood residents and the City had "ulterior motives" for seeking to shut down the bar. To that end, Peppers alleges that the basis for objecting to the renewal of

the license – the high number of police calls – was bogus and that the City and its police force were aware that the number of calls related to the bar was much smaller than as alleged by the City.

{¶ 38} From this record, we conclude that the claim regarding the 2003 objection made by the City is time-barred. The evidence in the record shows that the City filed its initial objection on April 23, 2003, but Peppers did not attempt to file its claim against the City until July 20, 2005 – more than two years later. Although counsel, at oral argument, claimed that Peppers was unaware that the City had falsely elevated the number of police calls, there is evidence that Schaefer knew within a matter of days following the objection that it was based upon the number of police calls. Schaefer testified also that within a "few" weeks thereafter he went and obtained the records of the police calls and discovered that "police reports for the whole area were being reported to [his] bar." Thus, the evidence demonstrates that for the 2003 objection, Peppers knew "within a few weeks" of the objection that its claim against the City existed.

{¶ 39} However, based upon this record we cannot determine whether the action is timely with regard to the subsequent objections made by the City in 2004 and 2005. There is nothing to indicate the basis for the City's later objections; whether they were based upon the same events that precipitated the original 2003 objection or whether they were based upon other matters. Thus, we cannot determine whether the subsequent objections were merely a continuation to the original objection or whether they constituted new actions separate from the original objection.

{¶ 40} Finally, we note that Peppers claims that it adequately demonstrated that the City had improperly elevated the number of police calls received during 2003 and that Peppers therefore showed that the City was using these calls as a pretext to object to the license renewal. We disagree.

{¶ 41} During the deposition of Moser, Peppers' attorney introduced a document that he expressly represented as being a list of call runs made to the area of the bar during 2003. Council then asked Moser to determine for each listed call on the document whether it was directly related to Peppers.

{¶ 42} Counsel has represented that Moser's testimony with regard thereto demonstrates that only thirteen out of fifty-nine calls were attributable to Peppers. We find no support for that conclusion. Instead, during her deposition, Moser testified that she did not recognize the document presented by counsel, and that she had never seen call runs reported in such a format. Further, as counsel went through each "call" on that form, Moser testified that she could not state with certainty whether it was related to Peppers because she did not have the actual police report to review. She further informed counsel that she would not agree with his assessment regarding the location of the calls because the document being utilized was not the actual report. Therefore we conclude that Peppers has failed to demonstrate, with regard to the 2003 objection, any improper conduct on the part of the City or the police force that would support a claim that the City was fabricating the reason for the objection.

{¶ 43} Peppers' First and Second Assignments of Error are sustained in part and overruled in part.

III

{¶ 44} The Third Assignment of Error provides:

{¶ 45} "THE TRIAL COURT ERRED IN FINDING THAT A CONTRACT OFFERED AND SIGNED BY THE DAYTON CHIEF OF POLICE IS VOID FOR LACK OF AUTHORITY TO CONTRACT FOR THE CITY OF DAYTON WHILE SIMULTANEOUSLY CLAIMING THE OFFERING AND SIGNING THE [SIC] SAME CONTRACT IS A PROPER GOVERNMENTAL FUNCTION PROTECTED FROM PROMISSORY ESTOPPEL."

{¶ 46} Peppers contends that the trial court erred by rendering summary judgment against it on its breach of contract and promissory estoppel claims against the City. Peppers' argument in this regard is not clear, but it appears that Peppers does not contest the finding that the Memorandum of Understanding does not constitute a valid contract. However, Peppers does seem to argue that it is entitled to recover damages under the theory of equitable estoppel, and that the trial court erred by finding otherwise.

{¶ 47} "Contracts or obligations can only be made and entered into by a municipal corporation as provided by statute." *Benner v. North River Ins. Co.* (Oct. 30, 1991), Hamilton App. No. C-900131, *2. R.C. 705.11, which governs the duties of a city's director of law, provides in part that "[the city law director] shall prepare all contracts, bonds, and other instruments in writing in which the municipal corporation is concerned, and shall indorse on each his approval of the form and the correctness thereof. No contract with the municipal corporation shall take effect until the approval

of the village solicitor or city director of law is indorsed thereon." Similarly, the City of Dayton Charter provides that contracts are void unless prepared, and endorsed, by the City Attorney. See, City of Dayton Charter §§ 55 and 92. Finally, municipal corporations cannot be made liable on the basis of an implied contract or for claims based upon the theory of quantum meruit or unjust enrichment. *Eastlake v. Davis* (1952), 94 Ohio App. 71, 74; *Cuyahoga Cty. Hosp. v. Cleveland* (1984), 15 Ohio App.3d 70, 72.

{¶ 48} Here, there is no dispute that the Dayton City Attorney played no role in the preparation or execution of the Memorandum. Nor did the City Attorney endorse the document. There is no evidence that the City Council or the City Attorney took any action that would ratify the Memorandum. Thus, the City cannot be bound by a contract that is not properly endorsed or "formally ratified through proper channels." *Wellston v. Morgan* (1901), 65 Ohio St. 219, paragraph three of the syllabus.

{¶ 49} We next address the claim that the trial court erred by determining that the claim for promissory estoppel against the City is untenable. The Ohio Supreme Court, in discussing contracts between municipalities and individuals, has stated:

{¶ 50} "Many times this court has held that no recovery can be had on a contract that is entered into contrary to one or more of the legislated requirements. * * *

{¶ 51} "A thread running throughout the many cases the court has reviewed is that the contractor must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril." *Shampton v. Springboro,* 98 Ohio St.3d 457,

460, 2003-Ohio-1913, ¶ 26 - 28, quoting *Lathrop Co. v. Toledo* (1966), 5 Ohio St.2d 165, 172-173.

{¶ 52} The Court further stated, that it has "adopted the doctrine of promissory estoppel set forth in the Restatement of the Law 2d, Contracts (1981), Section 90:

{¶ 53} "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

{¶ 54} "To be successful on a claim of promissory estoppel, '[t]he party claiming the estoppel must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary's conduct was misleading. Persons seeking to enter into a contractual relationship with a governmental entity are on constructive notice of the statutory limitations on the power of the entity's agent to contract. Since state and local laws are readily available for public review, it is a simple matter for a party to educate itself as to the procedural formalities with which government officials must comply before they may bind a governmental entity to a contract.

{¶ 55} " ***

{¶ 56} "*** As a result, even if [McManus] did make any promises regarding [the objection to the liquor license], [Peppers] could not have reasonably relied upon them. Liability does not attach to the city based on [Peppers' mistaken belief regarding the contract.] Thus, [Peppers'] claim of promissory estoppel is without

merit.

{¶ 57} "Our decision in this case is consistent with long-held principles of this court. 'An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit.' Protection of the public's resources in this context sometimes comes with a cost to misinformed parties." Id. at ¶ 32 - 36, internal citations omitted.

{¶ 58} Based upon the foregoing, we conclude that Peppers' claim that it is entitled to pursue a promissory estoppel claim with regard to the Memorandum of Understanding is without merit. We further conclude that the trial court did not err by rendering summary judgment on this matter. The Third Assignment of Error is overruled.

IV

{¶ 59} Peppers' Fourth Assignment of Error states:

{¶ 60} "THE TRIAL COURT ERRED IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACTS BY FINDING THAT [SIC] COLONIAL INSURANCE POLICY AT ISSUE DID NOT COVER 'ASSAULT AND BATTERY EXCLUSION' WHILE NOT FINDING THE FACT OF WHETHER OR NOT THE CLAIM WAS CAUSED BY AN ACTION PRECLUDED BY THE 'ASSAULT AND BATTERY EXCLUSION' IN THE POLICY."

{¶ 61} Peppers contends that the trial court erroneously determined that

Colony owed it no duty to defend or provide coverage for the claims brought by the Liquor Control Agents. Specifically, Peppers contends that "absent express language to the contrary, there is a duty to defend against allegations of assault and battery when there is a claim of self-defense, or protecting a patron because the use of reasonable force to protect a person is not an assault or a battery for the purposes of the assault and battery exclusion." Peppers further contends that the policy "is ambiguous when it comes to defense of patrons, and is silent on self defense."

{¶ 62} "A liability insurer's obligation to its insured arises only if the claim falls within the scope of coverage." *Cincinnati Indemn. Co. v. Martin,* 85 Ohio St.3d 604, 605, 1999-Ohio-322. "The insurer need not provide a defense if there is no set of facts alleged in the complaint which, if proven true, would invoke coverage." Id. "Thus, if it is established that the claim falls within an exclusion to coverage, the insurer is under no obligation to defend the insured." Id.

{¶ 63} "When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *** We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *** We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *** When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Colter v. Spanky's Doll House*, Montgomery App. No. 21111, 2006-Ohio-408, ¶29, quoting *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.

{¶ 64} The policy of insurance issued by Colony to Peppers is a comprehensive general liability policy which provides coverage and defense for bodily injuries and property damage as defined in the coverage description and not excluded elsewhere in the policy. Specifically, the policy provides:

{¶ 65} "Section I - Coverages

{¶ 66} "Coverage A. Bodily Injury and Property Damage Liability

{¶ 67} "1. Insuring Agreement

{¶ 68} "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply."

{¶ 69} The policy further provides:

{¶ 70} "Assault and Battery Exclusion

{¶ 71} "This Insurance does not apply to damages or expenses due to 'Bodily Injury,' 'Property Damage,' 'Advertising Injury,' or 'Medical Expenses' arising from:

{¶ 72} "A. Assault and Battery committed by any Insured, any employee of any Insured, or any other person;

{¶ 73} "B. The failure to suppress or prevent assault and battery by any person in A, above;

{¶ 74} "C. The failure to provide an environment safe from assault and battery or failure to warn of the dangers of the environment which could contribute to

assault and battery;

{¶ 75} "D. The negligent hiring, supervision or training of any employee of the insured;

{¶ 76} "E. The use of any force to protect persons or property whether or not the 'Bodily Injury' or 'Property Damage' was intended from the standpoint of the insured or committed by or at the direction of the insured.

{¶ 77} "This exclusion applies whether or not the insured, any employee of any insured, or any other persons, were under or alleged to be under the influence of alcohol."

{¶ 78} We find no ambiguity in this language. From the clear language of the policy, any claims for injuries arising from assault and battery are excluded from coverage. Furthermore, the exclusion explicitly refers to the use of force to protect persons; this encompasses claims such as self-defense and defense of others.

{¶ 79} The complaint filed by the Liquor Control agents against Peppers alleged that employees of Peppers assaulted the agents and that those employees were acting within the course and scope of their employment. There is no question of fact with regard to the coverage and exclusion in this case. A reasonable person could only conclude that any claims arising as the result of an assault and battery committed by the employees of Peppers are specifically excluded from coverage and thus clearly outside the scope of coverage.

{¶ 80} The Fourth Assignment of Error is overruled.

V

{¶ 81} Peppers's First and Second assignments of error having been sustained in part, that part of the judgment of the trial court rendering summary judgment against Peppers on its 42 U.S.C. §1983 claims based upon the City of Dayton's post-2003 objections to its liquor license is Reversed. The Third and Fourth assignments of error having been overruled, the judgment of the trial court is Affirmed in all other respects. This cause is Remanded for further proceedings with respect to Peppers's 42 U.S.C. §1983 claims based upon the City of Dayton's post-2003 objections to the renewal of Peppers's liquor license.

. . . . . .

GRADY and FROELICH, JJ., concur.

Copies mailed to:

John J. Danish
John C. Musto
R. Gary Winters
John J. Scaccia
Hon. A. J. Wagner