08-4642-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Stephen M. Guest, as Administrator of the Estate of
Kristine B. Guest, Deceased,
Plaintiff-Appellant

v.

Michael F. Hansen, Paul Smith's College of Arts and
Sciences, and Toni A. Marra,
Defendants-Appellees

On Appeal for Review of DECISION and ORDER, Motion for Summary Judgment by the United States District Court for the Northern District of New York

Brief for the Plaintiff-Estate of Kristine B. Guest

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Table of Contents

Table of Authorities

Statement of Jurisdiction

The District Court (Gary L. Sharpe) had jurisdiction under this motion pursuant to 28 U.S.C §1332. On December 18, 2007, the District Court entered a DECISION and ORDER, Motion for Summary Judgment (2007 U.S. Dist. LEXIS 92780) and entered the final judgment in this action on August 4, 2008. Plaintiff filed a timely notice of appeal on September 18, 2008, pursuant to Fed. R. App. P. 4(a) with additional time granted by the District Court pursuant to Fed. R. App. P. 4(a)(5). This Court has appellate jurisdiction under 28 U.S.C. §1291.

Statement of Issues Presented for Review

1. Whether Paul Smith's College duty to maintain safe premises carried to neighboring property given its proximity, the relationship of the activities occurring both on and off campus, the lack of any other party in position to succeed to the College's safety and security function, and the College's creation or contribution to the foreseeable dangers witnessed on neighboring property.

2. Whether the District Court's focus was misplaced given that the foreseeable dangers placed at risk scores of students not only the two who lost their lives.

3. Whether with a view of all the circumstances a genuine issue of material fact exists as to whether the conditions allowed on campus contributed to and created the dangerous conditions on neighboring property. Such determination of material fact is at trial and precludes the rendering of a summary judgment to dismiss.

Since this appeal centers upon questions of law, the standard of review for all issues is de novo.

Summary Statement of the Case

The primary issue is whether Paul Smith's College of Arts and Sciences owed the descendent a duty to guard against a witnessed foreseeable danger. The dangerous conditions were witnessed by the College on neighboring property but in close proximity to campus grounds. The existence of a special relationship with respect to the College's duty to maintain safe premises carried to neighboring property given that Paul Smith's College created or contributed to the foreseeable danger which carried from campus grounds to the neighboring property.

In the District Court's decision, four points are evident: 1) College personnel witnessed a dangerous situation involving scores of students, 2) College personnel consciously decided to not take effective steps to attempt to halt the dangerous situation, 3) two students eventually died from the dangerous activities which were foreseeable at the time the College had the opportunity to effectively intervene, 4) the facts, if determined true at trial, demonstrated to the District Court that the College was ineffective in enforcing the Student Code of Conduct as stated in its footnote 8: "The court does not suggest that the College's alleged laissez-faire attitude towards underage and/or binge drinking--if true--was appropriate or well-advised."

Therefore, the District Court clearly found the College's actions and enforcement of policies much less than what either the Court or the general public would find acceptable. However, the decision exonerated the College for the lack of finding duty under New York law. In the decision's duty analysis, two deficiencies are notable. First, the District Court focused on the College's duty to Rau and Guest rather than the scores of students and invitees who were at risk. Second, the District Court held that duty ended once the student or invitee stepped off campus grounds, regardless of the proximity, relationship of the activities occurring on and off campus, the lack of any other party in position to succeed to the College's safety and security function, and the College's creation or contribution to the foreseeable dangers witnessed on neighboring property.

The brief will demonstrate that with a view of all the circumstances, New York law has held that duty applies to a group, rather than solely to those injured, when a foreseeable danger to that group is apparent; and that duty extends to foreseeable danger on a neighboring property when one creates or contributes to the danger existing on the neighboring property. The Court is requested to consider the totality of facts in determining whether duty existed upon the College witnessing scores of students at risk from obvious foreseeable dangers.

Statement of the Facts in the Case[1]

Events occurring prior to February 5, 2005

Paul Smith's College of Arts and Sciences ("Paul Smith's College" or "College") is located in upstate New York, north of Saranac Lake in the Adirondack region. The College borders Lower St. Regis Lake (the "Lake"), and many of the College's main buildings face the Lake with the Lake as a central focal point. The College owns much of the land around the lake, including Peter's Rock, a peninsula directly across from the College's boat landing. Other than the College and a rustic lean-to on Peter's Rock, the only development around the lake is a few largely seasonal residences on a dirt road in one corner of the Lake across from the campus (AA-138 & 139; AA-195; AA-203-Sweeny Declaration). The College cites the Lake and the surrounding wilderness area in its information provided to current and prospective students (AA-158 & 159).

Alcohol use by minors was a constant occurrence at the College during the period prior to February 5, 2005, and College officials were very much aware of the behaviors. Incident reports reflect numerous and

[1] This expanded statement of facts is primarily drawn from the District Court's decision of December 18, 2007 with additional facts from the record included to provide "a view of all of the circumstances." The portions drawn from the District Court's reciting of the facts are italicized, with the facts added in regular type. All references are to the Appellant's Appendix filed with this brief.

continuous interventions for campus alcohol violations through the fall semester of 2004 to the night of February 5, 2005. Significant with these interventions was that many were inside designated wellness dormitories which are required to be substance free (AA-141; AA-112 & 113). The interventions were not only numerous but constant throughout the fall 2004 semester indicating diligence by Safety Officers and certain student resident assistants. However, the extent of necessary interventions demonstrates a failure by College officials and policymakers to send a significant message that the College was serious about enforcing violations of the Student Conduct Code. Safety Officer Shova expressed frustration as to how Toni Marra, Director of Resident Life at the College, often undermined the Safety Officers' efforts in addressing student safety and behavior issues (AA-76; AA-93). Enforcement was inconsistent with Shova stating that "everyone had their own approach to an alcohol incident" (AA-91). Marra exercised her position to overrule the judgment of the Safety Officers who deferred to her instructions (AA-78). Uncertain lines of authority further diminished the Safety Officer's effectiveness (AA-200; AA-59, bottom-identifies Marra as supervisor). Students were often disrespectful and even abusive to the Safety Officers (AA-143 to 149).

Students viewed the lake as a safety zone, free from meaningful College intervention and noted the regularity of such use (AA-123; AA-99 to 102; admitted by College AA-207 #24; AA 51; AA-78 to 82). One underage student resident assistant for a wellness dormitory noted: "you try to have fun when you could, and that was one way we could have fun, was have a fire on the lake, hang out with everybody, and have a carefree night" (AA-99). Another student testified to attending a smaller party on the lake the weekend prior to February 5, 2005 (AA-120 (Lake parties the two prior weekends); AA-51).

Marra and Safety Officers witnessed a bonfire party on the lake Friday night, February 4/5, 2005 (AA-140). Included in such activity was a truck doing "donuts" on the frozen Lake (AA-69, admitted by defense AA-206 #1; AA-140). Given the College's recognized jurisdictional concerns, the Safety Officers contacted the New York State Police. When the State Police arrived on campus, the bonfire was quickly extinguished and the individuals on the Lake dispersed. The State Police Officer scanned the lake but saw no activity (AA-77 to 81; AA-58). According to Safety Officer Shova's statement during the State Police investigation, "after searching the lake, Trooper Brown told us (Campus Security) that if we observed any

unsafe or illegal behavior that we should contact the State Police immediately" (AA-58).[2]

After the State Police left, Marra and the Safety Officers witnessed a truck erratically entering the parking lot. Marra and the Safety Officers confronted the driver and saw that the student driver was extremely intoxicated. The smell of beer was evident and beer cans were present (AA-163; AA-77 & 78; confirmed by AA-206 #1; AA-140). The student stated that "he was over across the lake drinking a few beers near the bomb fire with friends" (AA-140). Although the College was completing a week dealing with a student death in a truck accident while driving under the influence (AA-166 to 169), Marra declined to call in the State Police (AA-78; AA-164 to 166).

Events leading to the Deaths of Rau and Guest

Sometime in late January or early February of 2005, Joshua Rau, a sophomore at Paul Smith's College of Arts and Sciences in Franklin County, New York, invited three of his Pennsylvania school classmates and *Kristine Guest* (who Rau knew through Guest's roommate who was one of Rau's former classmates from Pennsylvania) (AA-173; AA-183 to 185) *to come*

[2] While some confusion existed with Safety Officer Shova's examination before trial the party disbursed by the arrival of State Police clearly did occur on Friday, the night prior to the fatal crash. Shova's deposition testimony is consistent with Shova's statement to the State Police the morning after the deaths and with Paul Smith's College Incident Report number 12755 (AA-140), both included in the record.

and visit him to celebrate his twentieth birthday. At the time, Guest, like Rau, was twenty years old and was a sophomore at Quinnipiac College in Connecticut. The other three women included Guest's roommate, another Quinnipiac student from Pennsylvania, and a third Pennsylvania friend attending Northeastern University (AA-173; AA-184 & 185). On the night of February 4, 2005, Guest and the Pennsylvania friends stayed at Northeastern where Guest used the occasion to dine with friends from Simmons College where she spent her freshman year. *Thus, on the morning of Saturday, February 5, 2005, Guest and the three other women drove from Northeastern University in Boston to Paul Smith's College.*

Guest and her friends arrived at Paul Smith's College at approximately 4:00 p.m. on Saturday afternoon. Upon their arrival, they freshened up and then went to dinner in the town of Saranac Lake with Rau. None of the party consumed any alcoholic beverages at dinner, or while in Saranac Lake. The group returned to Rau's dorm room at Paul Smith's College at 8:00 or 9:00 p.m., at which point Rau prepared a mixed drink, or punch, consisting of Jagermeister, peach Schnapps, and pineapple juice. The concoction was a specialty of Rau's; he had prepared the same drink for his Pennsylvania friend *during a previous visit to Quinnipiac* during the fall of 2004. *The group of friends hung out in Rau's dorm room, and passed the*

time by playing a drinking game called "checkers." The game was played much like ordinary checkers, except that shot glasses filled with the Jagermeister concoction were substituted in place of the usual red and black checker pieces. Under the rules of the game, a player was required to drink the contents of the shot glass. The participants grouped into teams to play. *Both Guest and Rau participated in the game of checkers,* however, the extent of Guest's involvement is uncertain given that post-mortem tests showed her blood alcohol level too low to measure (AA-153).

At around 10:00 p.m. after the game of checkers had wound down, Rau, Guest, and their friends walked down to the frozen shore of the Lower St. Regis Lake (the "Lake"). The Lake abuts the southwest side of the College campus and is about fifteen steps from the entrance to Rau's dormitory, Clinton Hall. The group brought the remainder of the Jagermeister-based mixed drink with them to the Lake in Nalgene bottles.

There was a bonfire out on the frozen Lake, and Rau, Guest, and the others walked out to join the people who had gathered there. The bonfire had been built by other students from Clinton Hall at around 5:00 or 6:00 p.m. independent from Rau's plans that weekend (AA-120; AA-41). Given the location of the eventual fire, such preparation was in full view of campus grounds on a main section of the campus and directly visible from Clinton

Hall and other dormitories and buildings (AA-64; AA-89; AA-119; AA-42; AA-104 to 105). The wood for the fire was primarily obtained from the College's Forestry Cabin (AA-105 to 106). *The bonfire around which the students congregated was approximately 200 feet from the shore. The pyre was visible from the campus, but the party was not audible from inside the campus dormitories* but was audible from many points on campus including outside Lakeside Hall where Marra spends the night while on duty (AA-201 & 202; AA-180 & 181; AA-190). The bonfire burned continuously throughout the night with students continuously feeding it with wood (AA-120 to 122; AA-53; AA-104 & 105). *Paul Smith's College does not own the lake; thus, the bonfire was not on College property.*

According to the recollection of one witness, when the group reached the bonfire shortly after 10:00 p.m. no one there appeared to be overly intoxicated. Rau, Guest, and their friends were feeling happy and/or "buzzed." Rau and Guest were at the bonfire on and off between the hours of 10:00 p.m. and 3:30 a.m. Given the cold, frequent trips to the dormitories were necessary (AA-105; AA-186; AA-176 & 177). *Like the other revelers, they returned to the campus for warmth from time to time,* some taking snowmobile rides to return to campus grounds (AA-193 & 194). *The party was a raucous affair. Between eighty and one hundred people were in*

attendance; alcohol was present in abundance (one underage resident assistant admitted drinking at least 15 beers in a four-hour span (AA-124 & 125)*; people threw cups of gasoline onto the fire;* approximately ten *snowmobiles were riding* on the Lake*; sometimes at high rates of speed; and students were intoxicated, some of them to the point that their voices rang out in shouts. In short, to at least one observer, the party was out of hand* and to another "out of control" (AA-85). Marra's reaction to the witnessed "gathering" was that any attempts to intervene would cause a riot, further confirming the out-of-control activities (AA-73; AA-60; AA-88).

Many of the students had already begun the party activity on campus prior to going to the bonfire. Two underage student resident assistants reported beginning their drinking or attending a party on campus before venturing to the bonfire (AA-112 & 113**;** AA-65). This duplicates the movement of Rau and his group.

Shortly before midnight, a snowmobile with two students aboard crashed into trees along the Lake. The snowmobile was damaged, but no treatable injuries resulted according to student participants (AA-115; AA-191 & 192; AA-72; AA-86).

At around 3:00 or 3:30 a.m. on the morning of February 6, 2005, the crowd at the bonfire began to disperse, although a core group of students,

including active snowmobilers, stayed throughout the night and continued to feed the bonfire (AA-120 & 121; AA-45 to 48; AA-53). *Rau, Guest, and their friends left the bonfire at around 3:30 a.m. and returned to Rau's dorm room. Rau and Guest did not consume any alcohol upon returning to Rau's room. Sometime later*, around 4:30 a.m., *the group returned to the bonfire and the frozen lake.* Fifteen minutes prior to returning to the bonfire, Rau spoke to Christopher Hansen who was returning to the Lake at that time. Rau told Hansen that the group would also return following shortly after Hansen (AA-194). Although the prospect of watching the sunrise was referenced with respect to Rau's group returning to the Lake, the sky was still very dark at that time since sunrise in that area was at 7:08 a.m. on February 6, 2005 (www.sunrisesunset.com). When Rau's group returned to the bonfire, *there were approximately twelve people at the bonfire, and there were as many as four snowmobiles on the Lake. Witnesses recall that Rau did not appear intoxicated when he was out on the Lake at around 4:30 or 5:00 a.m.*

Fog had blanketed the Lake throughout much of the night. In fact, at around 11:00 p.m., Rau had sought to borrow a friend's snowmobile, but the friend refused due to the heavy fog. However, when Rau and Guest returned to the bonfire at 4:30 a.m., the fog had lessened to a large *extent.* Lights

from cottages across the lake from the campus could be seen from the bonfire area (AA-47). *Rau asked his friend, Christopher Hansen, if he could use Hansen's snowmobile, and Hansen assented.* Previously during the night, at least two of Rau's Pennsylvania friends accepted rides on snowmobiles (AA-62; AA-175 & 176). Guest had not accepted a ride prior to 4:30 a.m. (AA-62). Rau first gave rides to two of the Pennsylvania friends. The third Pennsylvania friend rode off with another student driver. Neither of the girls had any complaints about these first two rides with Rau (AA-50; AA-179; AA-188) and Hansen noted that the rides were uneventful (AA-50). *After escorting the first two women around the Lake, Guest and Rau set off together on the Hansen snowmobile, with Rau driving.* While the previous two rides were circles around the bonfire, Rau took Guest further out onto the Lake (AA-179; AA-62). *Neither Rau nor Guest wore a helmet,* similar to the other snowmobile riders active at that time. *Helmets were available for their* use in the vicinity, but Hansen did not suggest that the helmets be worn (AA-49). One of the Pennsylvania friends stated that she was not aware that helmets were available (AA-189). *When the snowmobile did not return after five minutes, Hansen went to look for his friends. He came upon the overturned snowmobile near Peter's Rock, a peninsula in Lower St. Regis Lake, the land on which is owned by Paul Smith's College.*

The sled had struck the rocky promontory, went airborne, and struck and damaged the lean-to. *The bodies of Rau and Guest lay in the snow;* Rau on the opposite side of Peter's Rock where the sled struck, Guest below a tree on Peter's Rock where she struck a branch more than ten feet above the tree's base. *Both Rau and Guest died as result of their injuries.*

After the students around the bonfire heard reports of what happened, one student found it necessary to then extinguish the bonfire (AA-121).

When the State Police supervising investigative officer arrived sometime after 6:00 a.m., he reported seeing a still smoldering fire and numerous empty beer containers on the Lake a short distance from the smoldering bonfire (AA-151).

The Actions of College Staff

On the weekend of February 4, 2005, Toni Marra was on call to be available to respond to any student problems (AA-198 & 199). While on call, Marra lived in Lakeside Hall, a dormitory directly bordering the Lake near the bonfire (AA-197). *In the early morning hours of February 6, 2005, Toni Marra, then Director of Residence Life, and Jamie Shova, a Campus Safety Officer, went down to the Lower St. Regis Lake after receiving a report someone had gone missing, or been injured on the Lake.* Statements by Marra, Shova and a student confirm that such possible injury was as a

result of a reported snowmobile crash and possible injuries (AA-72; AA-86; AA-121). Such report came to Shova and Marra from a student resident assistant who was just leaving a party in Alumni Hall, a designated wellness dormitory, which became too loud for his tastes. The resident assistant received the news of the possible injury from a call received from the Lake. Marra and Shova were heading towards Alumni Hall when they were diverted to the Lake by the report from the resident assistant (AA-64 to 66). *Marra and Shova arrived at the Lake at approximately 12:45 a.m., only to learn that the report of an* injury *had been in error. They lingered for a time, and spoke with a number of students gathered on the frozen Lake. Although it was apparent to Shova that students were drinking, and that a potentially dangerous situation existed* noting that snowmobiles were being operated erratically (AA-93), *Marra and Shova elected not to call the* State Police or Shova's supervisor in the Office of Campus Safety as recommended by Shova (AA-95). Such decision was made by Marra over objections from Shova both as they approached the bonfire and as they returned to campus (AA-88; AA-92 to 95). Shova described the scene as dangerous (AA-93). Marra's instructions to Shova were not to write anyone up because she was concerned about starting a riot (AA-73; AA-88; AA-60). Marra based such concern on the assumption that students were drinking

(AA-73). Although Marra stated that she told the students to wrap it up and assumed that after she left that she was successful towards that end, no other individual present confirmed hearing such instructions (AA-124; AA-60; AA-121). *Further, although* Marra *may have encouraged the students to disperse or remain safe, they did not threaten them with any disciplinary action. As Safety Officer Shova explained, he had no jurisdiction on the Lake. At some point, Marra and Shova departed.*

The resident assistant who Marra and Shova met outside Alumni Dormitory passed Marra and Shova as they returned to campus. The resident assistant reported activity around the bonfire at that time had continued unabated soon after Marra and Shova left the bonfire area (AA-65). After leaving the bonfire, Marra and Shova did not follow through on the prior report of a party at Alumni Dormitory (AA-201 & 202; AA-60). *No College officials were present on the Lake when Rau and Guest returned to the lake from Rau's dorm room at* 4:30 a.m. nor did Marra instruct any of the Safety Officers to periodically go to the lakeside during the night to ensure that the bonfire party had indeed ended (AA-201 & 202; AA-60).

College Policies and Procedures

Paul Smith's College's policies and procedures for the 2004-2005 school year were set forth in a document referred to as the Community

Guide. Pursuant to College policy, as delineated in the Community Guide, students under the age of 21 were prohibited from consuming or possessing alcoholic beverages. More broadly, the Community Guide stated that the violation of federal, state, or local laws would constitute a violation of federal, state, or local laws would constitute a violation of the College's Student Conduct Code. The Community Guide states that "the College Safety Department and Resident Life Department are responsible for any issue related to alcohol, narcotics, and dangerous drug violations that are reported receive immediate attention and are thoroughly investigated" (AA-136). Violations of the Student Conduct Code are stated to include "committing off-campus violations of federal, state, or local law that adversely affect the College and/or the pursuit of its objectives" AA-134 at 8.2(1)). *Additionally, although students were permitted to have snowmobiles, the use of the snowmobiles on College-owned property was forbidden. Thus, in order to gain access to the Lake, Christopher Hansen would transport his snowmobile via a trailer to an inlet down the shoreline which was not on College property.*

Argument

Argument-Applicable New York Law

General Considerations

While alcohol was a factor in the tragedy that befell Guest and Rau, the claim for negligence is not centered on the College's failure to effectively control illegal and excessive drinking. The primary negligence of the College is the failure to use reasonable steps to effectively intervene when a multitude of foreseeable dangers were directly in their view only steps from campus grounds. Furthermore, despite jurisdictional concerns, the College had the means to successfully intervene in dangerous activities which were an extension of similar gatherings inside campus buildings.

The partying was carried to the Lake as a result of overall lax application of College rules both on and off campus which led to a student view that the Lake was a safe haven where illegal and excessive activities could occur in the open without consequence. That the means existed to effectively intervene was demonstrated the previous night. Additionally, since the conditions on the neighboring property were created by the activities begun and ongoing on campus, prompted by the College's ineffective efforts to address pervasive illegal and excessive use of alcohol products on campus, the College's duty in a special relationship as a

property owner and provider of housing to maintain safe premises flowed to the neighbor's property when the College became aware of such reckless and dangerous activities.

The Court is not being asked to require Paul Smith's College, nor any college or university, to track student movement and ensure their safety. In loco parentis has long been rejected in New York and other jurisdictions. However, all residential institutions of higher education must recognize the often irresponsible and reckless behavior of college-aged students acting in groups, especially when alcohol is an ingredient in the activities. As the District Court stated in its opinion "the evidence establishes that Marra and Shova did not undertake to stop the party, in fact, they adopted a hands-off approach, implying their acquiescence in the continuation of a dangerous activity that was underway."

Unfortunately, by focusing on this specific incident and the in loco parentis doctrine of controlling every aspect of student behavior, to the extreme tracking of student movements, the District Court concluded that New York law did not attach duty to the College in such an egregious example of failing to use reasonable care when confronted with a foreseeable danger. The District Court's decision was not based on any facts

that reflected favorably on the College, but solely based on the District Court's inability to determine duty.

The main flaw in the District's Court's analysis is its focus on the specific movements of Rau, rather than the dangerous conditions that placed scores of students at risk. College personnel encountered a scene where a significant number of students were in a raucous setting engaged in reckless activities. As determined in the notable *Palsgraf* decision[3], a specific injury to a specific individual or in a specific manner need not have been foreseeable, but reasonable care is necessary upon encountering an overall dangerous activity and the risk of injury was foreseeable.

The documented facts as submitted with this brief establish that: 1) in view of all the circumstances, the College's indifference reflected by failing to effectively respond to illegal and dangerous activities in the recent past created an environment where disaster was sure to strike; 2) the interrelationship between the activities around the bonfire and on campus was such that it should be treated as a single, interrelated activity; and 3) the College's past actions served to create or contribute to the dangerous activity witnessed on the Lake. After considering all of the facts on record, duty

[3] Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99 [1928]

does exist under applicable New York law which in turn requires a reversal of the District Court's dismissal of the claims against the College and Marra.

Non-Static Nature of the Law Related to Responsibility for Student Safety

One's perception of a college's or university's obligation for student safety largely depends upon point of view. Parents and students have certain expectations and beliefs, while college administrators and their legal advisors have a much different view. The academic community often misinterprets the rejection of in loco parentis as relieving their institutions from any responsibility for student safety, and any deviation from this view as a return to in loco parentis. This is the argument repeatedly made by the College. However, a proper reading of current trends reveals a movement towards a more balanced approach to student safety issues, one that parents, students, and society would expect and one that should not place an unreasonable burden on any college or university who exercises reasonable care in addressing student safety issues. As the facts demonstrate, the egregious actions of Paul Smith's College personnel the night of February 5/6, 2005 fall far short of any reasonable care standards and were in fact reflective of an overall campus approach which resulted in five alcohol

related student deaths in 2 ½ years at an institution with a student population of less than 1,000. [4]

The defendant's memorandum of law relies heavily on a New York case which rejected the doctrine of in loco parentis (*Eiseman v. State of New York*, 70 N.Y.2nd 175, 190 (1987). Included in its decision, the court in *Eiseman* cited a 1985 article regarding the national trends related to college's and university's obligation for student safety, "The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and the University (12 J Coll & Univ L Rev 343) by Donald L. Reidhaar."

Given that the court's decision in *Eiseman* determined that national trends were relevant in considering the direction of New York law in 1987, similar attention is warranted to current studies of the status of the relevant law as provided in *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* (Durham, N.C.: Carolina Academic Press, 1999) authored by R. D. Bickel and P. F. Lake together with Professor Lake's 2005 update *Private Law Continues to Come*

[4] Stephen Welch on January 29, 2005 died in a truck accident outside of campus while driving under the influence (AA-166 & 167). On May 4, 2007, Sean Cornell and Lee Walker drowned while accessing a party across the Lake. All three were Paul Smith's College students. These are only three of the more than 1,700 college-aged individuals who die each year in alcohol related incidents (National Institutes of Health). Query, how many of these deaths were preventable with responsible adult action when the opportunity existed?

to Campus: Rights and Responsibilities Revisited (Journal Of College And University Law 621). These publications trace the evolution of the relevant law from the rejection of in loco parentis as a consequence of the turbulent 1960's, though a stage where several influential decisions severely limited a student's right to seek recourse from a campus injury (referred to by the authors as the "by-stander era"), to the current trends which strike a more reasonable balance between student rights and responsibilities and a college's or university's obligation to maintain a safe campus. Application of the in loco parentis doctrine is not requested by the plaintiff but continues to be the focus of the College, who unfortunately seems to continue to fight the battles of the sixties and seventies. The emphasis should be on the alternative to in loco parentis and the by-stander era, which is not only the focus in many jurisdictions across the country, but had its foundation in New York decisions during the 1980's which produced in loco parentis rightful demise.

Numerous cases have been decided applying this more reasonable standard. The District Court considered at least one of these having referenced *Furek v. University of Delaware* (594 A.2d 506 Del. 1991) but discounted its applicability under New York law. However, upon further reviewing the current trends, one finds that *Furek* and the other recent cases

not only have a basis in New York law applying concepts introduced in *Nallan v. Helmsley-Spear, Inc.* (50 N.Y. 2d 507; 407 N.E. 2d 451; 429 N.Y.S.2d 606; 1980) but are also consistent with New York cases involving colleges.

As with the trends leading to the 1985 cited article, four recent decisions are most reflective of the current trends. The analysis used in these cases is most appropriate to apply to the facts in the current case. The earliest of the four is *Furek* where the court determined that a known dangerous activity, hazing, was identified by the university's administration but not adequately addressed. Subsequent cases in various jurisdictions applied the *Furek* analysis to their distinct set of facts in applying duty standards to the respective institution [*Knoll v. Bd. of Regents of University of Nebraska*., 601 N.W.2d 757 (Neb 1999); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2nd 300 (Idaho 1999) and *Delta Tau Delta v. Johnson*, 712 N.E.2nd 968 (Ind. 1999)].

As Professors Bickel and Lake state, these cases do not revert to in loco parentis where colleges and universities are made responsible for every activity which occurs behind closed doors but instead require those institutions to exercise reasonable care when aware that dangerous practices and behaviors exist and are prevalent. In their treatise, Professors Bickel

and Lake express the transition from the wide-spread rejection of in loco parentis and the following bystander era as follows:

> "The rules that will be applied recognize that the university is a unique, if sometimes business-like, environment where special applications of more general negligence and duty rules are needed. The new image is one of shared responsibility and a balancing of university authority and student freedom. Duty is the vehicle which courts use to make this happen."[5]

In applying the standards of private law to colleges and universities with this transition, the precedents applicable to landlord/invitees are commonly used (referenced in District Court's footnote 12 as "premises liability"). This is reflective of a residential college's role as not only an educational institution but also a landlord supplying housing and other services including security. The lead case cited in the treatise for landlord duty is again a New York case, *Nallan*. Also noteworthy, the decision in *Nallan* is based on an analysis similar to the totality of circumstances test applied in *Knoll, Coghlan and Delta Tau Delta*.[6]

In the later decisions, the courts used the totality of circumstances analysis in applying the duty standards and whether proximate cause was present in the institution's failure to address the dangerous situations which

[5] *The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life?* (Durham, N.C.: Carolina Academic Press, 1999), R. D. Bickel and P. F. Lake, page 105

[6] See *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited* (Journal Of College And University Law 621), pages 626 to 633, for a discussion of these cases and the totality of circumstances test.

resulted in injury. Therefore, those decisions have a strong basis in New York law. Furthermore, New York case law has numerous precedents beyond *Nallan* involving the college setting which apply a similar analysis. Therefore, a view towards all of the circumstances' analysis is necessary in evaluating Paul Smith's College and Toni Marra's responsibility for Guest's tragic fate to allow an analysis consistent with *Nallan* and other relevant New York decisions.

Unfortunately, the District Court's decision continued to focus on New York law in a bystander era manner which greatly limits a college's responsibility for general student safety. This holding is based on limited reading of cases decided under New York law in the recent past.

Rejection of In Loco Parentis Did Not Eliminate All Responsibility for Student Safety

The appropriateness of applying overall trends to New York law is further confirmed by a deeper review of a case relied heavily upon by both the College and the District Court. The District Court quotes *Eiseman* stating that "colleges today *in general* have no legal duty to shield their students from the dangerous activity of other students" (emphasis added). Since the "in general" qualification does not provide a total safe harbor from dealing with student safety issues, a review of the lower court's reasoning is

warranted. The New York Supreme Court in *Eiseman* qualified its "in general" statement by stating:

> "That is not to say that a college is absolved of all responsibility for the safety of its students. Students enroll in a college in the expectation that, not only will they be afforded the means to derive an education in an atmosphere conducive to the stimulation of thought and learning, but also that they will be permitted to do so in an environment reasonably free from risk of harm. A college is not expected to be a guarantor or insurer of the safety of its students, but obviously is expected to provide, in addition to an intellectual climate, a physical environment harmonious with the purposes of an institution of higher learning. To that end, it employs a security force and establishes rules and regulations, breach of which can lead to suspension or expulsion." (*Eiseman v. State*, Appeals Nos. 1, 2, Supreme Court of New York, Appellate Division, Fourth Department, 109 A.D.2d 46; 489 N.Y.S.2d 957; 1985 N.Y. App. Div.)

Therefore, Eiseman strongly recognized the need to prevent the new standard which rejected in loco parentis from leading to sanctioning of a college's indifference for student safety such as that demonstrated at Paul Smith's College.[7]

As the District Court correctly notes in its decision, the College, like any landowner, was obligated to keep its premises free of known dangerous

[7] The College recognized this overall duty by establishing an Office of Campus Safety whose mission statement states its role as follows: "The Campus Safety Office is comprised of dedicated professionals whose mission is to keep the Campus community safe for students, faculty, and staff. The office works diligently with other Campus Life offices and other departments in a cooperative effort to achieve their mission." The College website further states: "Paul Smith's College is committed to maintaining a safe and secure environment for all of its students, employees and guests." Unfortunately for Rau and Guest, the College administration did not allow the Office of Campus Safety to properly exercise its judgment towards this stated end.

conditions.[8] A similar analysis has been successfully applied in student safety cases around the nation as well as in New York. The decision in (*Miller v State of New York*, 62 NY2d 506, 510) involving a sexual assault in a college dormitory with inadequate security states in part:

> "As a landowner, the State "must act as a reasonable [person] in maintaining his property in a reasonably safe condition *in view of all the circumstances*, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (quotations and citations omitted-*emphasis added*)."

The appellate court in *Eiseman* recognized the importance and distinction in Miller in its footnote 3: "As is made clear in the Restatement, however, this section presupposes the existence of a duty (see, Restatement [Second] of Torts § 302 B, comment a; § 302, comment a), and thus cannot supply the fundamental omission here. Similarly inapposite are cases where there is a special relationship with a student, and cases imposing liability for failure to maintain school premises (see, e.g., *Miller v State of New York*, 62 NY2d 506)."

[8] In the District Court's footnote 12, the distinction is made between physical conditions of College property in contrast to non-physical conditions that threaten overall safety, such as the ongoing activities around the bonfire. Therefore, NY CLS Gen Oblig § 9-103 providing immunity for owners and lessees of facilities used for recreational uses such as snowmobile riding is not applicable since negligent oversight of the dangerous situation resulted in the injuries, not unique defects in the physical conditions. This conforms with the statutory exemption from immunity when the injury resulted from "willful or malicious failure to guard, or to warn against, a dangerous condition."

Likewise, in *Nieswand v. Cornell University*, 692 F. Supp. 1464, 1988 U.S. Dist. LEXIS 9147 (N.D.N.Y 1988), an analysis similar to *Miller* was used to reject a summary judgment motion by Cornell. The District Court liberally cited both *Nallan and Miller* in viewing past history of criminal activity to conclude "question of material fact exists as to whether Cornell University could have foreseen the criminal activity in this case so as to give rise to a duty on its part to provide adequate security measures."

Miller not only applies the landlord/invitee analysis similar to the recent student safety cases decided around the country but also refers to a test for determining duty consistent with the totality of circumstances test applied in *Knoll, Coghlan*, and *Delta Tau Delta*. The tracking of the movements of a specific student or individual is not necessary. Rather, an evaluation of the overall conditions on campus which led to tragedy is required. In considering the totality of the circumstances, the Court need not alter, reverse, or otherwise disregard New York law in evaluating the College's duty in this case. Such analysis not only is allowed under New York law, but is required and leads to the just result.

Applying Duty When an Identifiable Group is at Risk

In its decision, the District Court relied upon *D'Amico v. Christie*, 71 N.Y.2d 76, 88 (N.Y. 1987) in holding that no duty existed for a landlord to

track the movements of an intoxicated individual, such as Rau. This singular focus is flawed in two respects. First, unlike the situations addressed by the *D'Amico* line of cases, the reckless activities witnessed were not of a single individual, but in the College's case, scores of students. Second, although alcohol was a contributing factor in the overall dangerous situation[9], it only exacerbated the existing presence of other dangerous conditions and activities around the bonfire. Rau and Guest as individuals were at risk. However, the scores of students seen at the bonfire were all equally at risk. Applying duty to the group around the bonfire does not serve to extend the College's duty to society in general. Nothing in the record indicates that Marra and Shova left the bonfire with the impression that those present were other than primarily, or exclusively, students. The focus of the court must be on the foreseeable dangers threatening the safety of the group, not solely Rau and Guest.

This focus on the overall foreseeable danger to a group is appropriate under New York law as provided in the landmark *Palsgraf* decision which states:

> "This [***10] does not mean, of course, that one who launches a destructive force is always relieved of liability if the force, though known to be destructive, pursues an unexpected path. "It was not

[9] In its memorandum of law, the College expressly minimized the effect of alcohol with respect to the overall dangers present, therefore, making the D'Amico analysis even more inappropriate. Defendant's Reply Memorandum of Law in Further Support of Summary Judgment, page 4.

> necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye""[10]

The focus on the overall danger in hazing activity in contrast to the control over a specific individual was the basis for rejecting a summary motion to dismiss in *Oja v. Grand Chapter of Theta Chi Fraternity*, 680 N.Y.S.2d 277, 278 (3d Dep't 1998) which stated "that defendant's liability stems not from its duty to supervise decedent's activities, but from its actual or constructive knowledge of the dangerous activities taking place on its property and its failure to control those activities, despite having ample opportunity to do so."

When a Property Owner's Duty to Maintain Safe Premises Carries to Neighboring Property

In its decision, the District Court held that any duty that the College had ended once the activities left the College's land. Again, the District Court's focus centered on the specific movements of Rau and not with a view of all the circumstances. Upon taking a broader view, one can only conclude that the activity around the bonfire was an extension of preliminary and ongoing similar activities on campus. Furthermore, the College's

[10] Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99 [1928]

ineffective efforts to address pervasive illegal and excessive use of alcohol products on campus fostered the permissive climate on campus which led to the Lake activities.

In its footnote 14, The District Court cited *Galindo v. Town of Clarkstown*, 2 N.Y. 3d 633, 636 (N.Y. 2004) with the quote that "an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, *unless the owner had created or contributed to it."* (emphasis added) Numerous decisions apply this rule, including decisions extending duty to hazards on neighboring property (*Herbert v Rodriquez*, 191 AD2d 887, 595 N.Y.S.2d 129, *Brady v Maloney*, 161 AD2d 879, 555 N.Y.S.2d 925, and *Forelli v Rugino*, 139 AD2d 489, 526 N.Y.S.2d 847). Upon considering a view of all the circumstances, the Court can only conclude that the hazards that were present on the Lake followed freely from campus grounds to the bonfire party, similar to the icy water flowing to the neighboring properties in these sidewalk cases.

Argument-Application of New York Law to Facts of this Case

A View of All the Circumstances

As previously noted, consideration of a view of all the circumstances is necessary in evaluating the overall safety of an environment when an

owner owns or controls a premises and a special relationship exists with respect to tenants and invitees. The test was applied in *Miller*, but was also the basis for the decision in *Nallan*. Both cases considered occurrences and overall events leading to injury and evaluated how the overall environment contributed to the specific injury at issue. The court considered not only the conditions directly prior to the injury but also events in the recent past which made the likelihood of injury foreseeable; therefore, required reasonable steps to guard against the foreseeable danger.

The facts on record demonstrate that the College's enforcement of violations identified in its Community Guide was less than effective, especially with respect to underage and excessive alcohol use by students (the District Court noted as such in its Footnote 8.) While this fact cannot in itself constitute a duty as so noted in the District Court's decision, its consideration is appropriate while determining whether the College maintained safe premises in view of all the circumstances. An incident report tabulation **(**AA-141**)** demonstrates consistent and ongoing interventions involving violations related to alcohol use. While first impression may be that this demonstrates diligence by the College overall, a close review of the details and consideration of related facts leads one to conclude otherwise.

The tabulation for the fall 2004 semester and the first few weeks of the 2005 winter semester listed over 150 alcohol related violations for a student population of approximately 800 students. Furthermore, a significant portion of the violations were in wellness dormitories as identified in the College's Biennial Review required under the Drug Free Schools and Campuses regulations.[11] The extent of violations demonstrates active intervention by Safety Officers and often by student resident assistants. However, as Safety Officer Shova noted, once they encountered a violation, Director of Resident Life Marra is called to determine the final disposition.

As with any enforcement effort, the effectiveness of any intervention is driven by the severity of the consequences. Shova noted how the actions of the Safety Officers were often undermined by Marra. That the violations in wellness dormitories were so constant and frequent demonstrate how intervention without meaningful consequences and messages from the College administration failed to effect change in behavior. If after a single incident the College notified all residents in wellness dormitories that future violations would be addressed severely, including removal of the right to

[11] (EDGAR), Part 86, Drug Free Schools and Campuses Regulations. The College's Biennial Review covering the period 2004 and 2005 listed Alumni, Lambert, Livermore, Blum, and LMS as designated wellness dormitories. Note that this conflicts with the Community Guide with omits Livermore and LMS.

reside in a wellness dormitory, the frequency of incidents in such dorms would surely diminish. Students, many with the likely prodding of parents, select a wellness dormitory as a shield to the substance abuse at many colleges. For the College not to take reasonable steps to satisfy the expectations of parents and students in selecting this promised living environment, surely contributes to a less safe environment.

Student attitudes about underage drinking and the loose environment on campus are evident through the statements and actions of the students. Two underage student resident assistants began their drinking in wellness dormitories prior to venturing to the bonfire. One of those resident assistants expressed how parties and the consumption of alcohol were expected, given that they are college students. Student attitudes towards Safety Officers were often disrespectful and abusive. Students treated the prospect of College interventions like a cat and mouse game, with the prospect of confiscation of the alcoholic products the only meaningful consequence.

The Lake and other forest areas surrounding campus were viewed as a safe haven for open underage drinking, recognizing that the College's jurisdiction did not extend to the Lake and other off campus locations. Evidence exists that such off campus parties were frequent. On the Lake,

students realized that there was a small likelihood of intervention by college personnel because of jurisdictional issues. If other authorities were called, they had time to disperse as evidenced when the Friday Lake party ended upon the arrival of the State Police. A similar gathering on campus would likely have resulted in confiscation of the alcohol and possibly a sanction noted in the student's records. On the Lake, the ability to disperse made even confiscation less likely. If the College imposed meaningful consequences for alcohol violations on campus, students would likely not only reduce such activity on campus but also be hesitant to gather steps off campus in full view of campus grounds as they did twice on the fatal weekend. Therefore, all night parties in a frigid environment requiring frequent trips to campus for warmth would not only be unlikely, but impractical.

Therefore, the activities on the Lake were an extension of the activities on campus. Such activities were allowed to exist and continue on campus and to gravitate to the Lake based on the indifference of the College administration and its resultant lax enforcement of policies. The College created and contributed to the dangerous conditions on the Lake. Therefore, like the water flowing from one's property creating ice on a neighbor's sidewalk, *Galindo's* exception to limiting duty at a premise's border does

not apply to the campus environment where reckless behaviors were allowed to flow to the Lake as result of the College's demonstrated indifference to student safety.

On Friday evening, February 4, 2005, Marra, Shova, and Safety Officer Thibodeau witnessed: "a large fire, yelling and screaming was noticed across the lake." How they reacted to that observation and subsequent events that evening affects significantly how one views Marra's actions the next night.

After being called by Safety Officer Thibodeau, the State Police arrived on campus. The fire was quickly extinguished, and the students dispersed as described in Shova's pre-trial deposition. The State Police, therefore, found no activity when they scanned the Lake but offered further assistance if any further unsafe or illegal behavior was observed. This incident demonstrates that the College not only had the proximity to observe activities on the Lake but also had 1) the sense of duty to respond to such incidents and 2) the means to respond effectively if so needed.

Another event that Friday evening provides evidence of Marra's approach to an obviously unsafe condition and the exertion of her authority over the judgment of the Safety Officers. During that same time period, the

Safety Officers and Marra witnessed a truck on the Lake doing donuts and possibly the same truck on the Lake heading towards the forestry cabin. Subsequently, they witnessed a truck erratically entering a nearby parking lot. Upon confronting an obviously intoxicated student driver, Marra declined to call the State Police and only took control of the student's keys and sent him to his dormitory. As with the other enforcement actions on campus, Marra declined to use this incident to set a stern example to all students who consider driving under the influence. This stern message would have been most effective given that the College was just completing a week of dealing with the death of a Paul Smith's College student from a truck accident close to campus. The deceased student was driving while intoxicated.

As the District Court notes, "the evidence establishes that Marra and Shova did not undertake to stop the party, in fact, they adopted a hands-off approach."[12] Implicit in this statement is the District Court's conclusion that the facts demonstrate that 1) a dangerous situation existed, 2) that the opportunity for serious injury was evident, and 3) that the College consciously decided not to intercede. Therefore, the Court does not need to

[12] The College confirms that Marra "did not go out to the bonfire to find out if anyone was drinking or to break up the party" in its Defendant's Reply Memorandum of Law in Further Support of Summary Judgment, page 4. This was confirmed by the College despite Marra's repeated statements to the contrary, as noted in the facts summary and footnote 13.

be convinced further on these points. However, certain aspects must be highlighted to gain a clearer understanding of the totality of the facts.

Marra and Shova were answering a complaint related to a loud party in a wellness dormitory, Alumni Hall, when they learned of a snowmobile crash and possible injury on the Lake. As result of this report, they diverted their attention from Alumni Hall to the new concerns regarding the possible injury. The news of the snowmobile crash and the scene witnessed upon entering the Lake made concerns about possible further injuries most foreseeable. Demonstrating her view that the situation around the bonfire was out of control, Marra instructed Shova not to write anyone up or otherwise intervene for concern of starting a riot. Marra based her concern on the stated assumption that people were drinking. Marra then expressed that her only concerns were the possible prior snowmobile related injury and the loudness. That the nighttime snowmobile use, excessive speed common with snowmobile use on a lake, increasing fog, and recognized overall out-of-control situation created an obvious danger to student safety were not expressed as an overriding concern is reflective of Marra's other actions noted in the record.

Marra's decision not to effectively intervene conflicted with Shova's judgment to call State Police and whoever else may be in the position to address what he saw as a dangerous situation. The actions of Marra while present on the Lake are reflective of indifference to student safety issues as exhibited Friday evening with respect to the intoxicated student truck driver, the ineffective intervention with continuous alcohol use on campus, and Shova's frustration with the Safety Officer's efforts being constantly undermined.

An overriding flaw in College policies and practices is an uncertain line of authority for personnel involved with student safety. In his statement to State Police, Shova referred to Marra as his supervisor. The facts demonstrate that Safety Officers were required to defer to Marra with respect to the outcome of pending interventions. However, in her testimony Marra rejects any characterization of her responsibilities to include supervision of Safety Officers. Shova and the other Safety Officers in fact reported to the head of the Office of Campus Safety. Shova even suggested calling his supervisor, Pete LeMere, after Marra rejected his recommendations to call the State Police; but Marra also rejected that suggestion. This confused chain of command, combined with the overall indifference displayed by Marra that night and in the past, and the obvious

desire of students to take full advantage of the situation created unsafe conditions which surely would someday lead to disaster.

Dangerous Conditions on the Lake Created or Contributed to by the College

Based on the District Court's decision, the analysis does not stop here. As the facts demonstrate, foreseeable dangers were very apparent; but given that the noted activity occurred on the Lake which was not the property of the College, the District Court determined that any special duty that the College owed to invitees ended once the students left campus grounds.[13] Case law was cited as authority for that position. However, the qualification in *Galindo*, "unless the owner had created or contributed to it," was not considered by the District Court, given the Court's focus on the movements of a specific student rather than a view of all the circumstances. Upon reviewing all of the facts during the period surrounding the accident, not only was the fatal snowmobile crash foreseeable but the College's

[13] Although the College stresses its lack of jurisdiction on the Lake, Marra's initial statements to the State Police and subsequent testimony, stressed how she told students to "wrap it up" (although all other witnesses dispute that this instruction was mentioned) and left the bonfire with the assumption that this was happening. This demonstrates Marra's initial reaction that the extent of her actions to intervene on the Lake would be scrutinized, if not at the time of the visit to the bonfire but after learning of the deaths. Marra realized that a duty to intervene would be expected. Note that Marra's statement to the State Police and her subsequent testimony conflict with the College's current disclaimer of any duty or attempt to react to safety issues on the Lake.

indifference contributed heavily towards the environment that made the bonfire party on the Lake possible.[14] Therefore, the special duty owed to students and invitees to maintain safe premises carried to the activities on the Lake since the College greatly contributed to, and even created, the hazards present that night.

Reasonable Expectations of the Public

The nature of the College's location and the remoteness of the Lake bolster expectations of the public that a college has a duty to take reasonable steps to effectively intervene when confronted with a situation such as the bonfire. For most colleges, when students leave campus grounds, a public safety apparatus is generally present to replace the safety and security function of the college's security personnel. Therefore, in most situations limiting the special duty to maintain safe premises rightly ends at the campus borders. Lower St. Regis Lake borders and is largely surrounded by property owned by Paul Smith's College. Without the College, the area around the Lake would be largely a wilderness area. Further, the Lake is a prime focal point of the campus. The College provides boats for use during

[14] The District Court's footnote 8 saw the need to express its disapproval of the "College's alleged laissez-faire attitude towards underage and/or binge drinking-if true." Therefore, that the District Court found sufficient facts to raise this concern solidifies the need to resolve whether this alleged attitude did in fact create or contribute to the unsafe conditions around the bonfire. Such determination of material fact is at trial. As standard for summary judgment is consistently applied, the College can prevail on its motion only if it can show that no genuine issue of material fact exists for trial. See Fed. R. Civ. P. 56(c).

various times of the year, and much of the campus infrastructure centers on the Lake.[15]

The sole responsible authority in position to provide such notification of obvious safety hazards on the Lake, especially after midnight, is the College. The College Safety Officers, State Police and, most tragically, students recognized this. Unfortunately, Marra and the College administration did not recognize nor act upon this obvious fact. As the District Court noted, one aspect in balancing duty determinations is the "reasonable expectations of parties and society generally." Additionally, the following qualification in the *Galindo* decision is notable: "We do not exclude the possibility that some dangers from neighboring property might be so clearly known to the landowner, though not open or obvious to others, that a duty to warn would arise." Given the circumstances, the public should reasonably expect that the College properly exercise that duty when confronted with a dangerous situation in a remote location but lacks the jurisdiction to intervene. This was the basis for the offer by State Police on Friday night. Further, Shova's recommendations to Marra that someone be called to intervene demonstrates that College employees recognized that

[15] That the Lake was a focal point of campus life is evident by the entry page to Paul Smith's College web site. Rather than a photograph of the entrance, main buildings, student classroom activity or even the mountains, the entry page features the Lake as a "Welcome to 14,000 Acres of Opportunity."

fact. The College can be argued not to have a legal (but possibly under the circumstances a moral) obligation to periodically check for dangerous activity on the Lake if visible from campus grounds. However, when an obvious danger is witnessed, the College is properly called upon to be the State Police's eyes and ears, especially given that the bonfire activity was largely an extension of activities on campus. The College had both the knowledge and the means to intervene. If the College does not notify the State Police when such a foreseeable danger exists on the Lake, who will?

Foreseeable Risk to all Students Present v. Only Rau and Guest

In its safe premises analysis, the District Court solely focuses on the movements of Rau and the lack of a college's or a landlord's duty to track the activities of an individual, including an intoxicated individual. Landlord responsibility surely does not entail tracking the actions of each tenant and invitee but does require reasonable steps to maintain a safe environment. This is where the College negligently and tragically failed. The failure was not with respect to the physical facilities, but with respect to allowing illegal and obviously dangerous activities to continue.

Numerous cases have now been decided where a view of all the circumstances demonstrated that the college or university was aware of

ongoing violations of student conduct code or illegal activity but did not take reasonable steps to limit or prevent such activities. The current case is distinct in that the circumstances which led to injury were witnessed directly by College personnel; therefore, not only did a general awareness exist of a foreseeable danger, but College personnel witnessed the obvious foreseeable danger. Therefore, the Court is not asked to apply the totality of circumstances test to the extent applied in other jurisdictions, but only to utilize the test to 1) further confirm that a foreseeable danger existed when Marra and Shova questioned students on the Lake and 2) furthermore, demonstrate that the College created and/or contributed to the dangerous situation on the Lake.

The cases which were decided based on a general awareness of foreseeable danger are summarized as follows:

- In *Furek*, the Delaware court considered knowledge of prior hazing incidents, administration directives to student groups to cease hazing, and evidence that hazing continued despite the awareness and ineffective attempts to intervene. The court found that the university did not use reasonable steps to address a foreseeable danger.
- In *Knoll*, the Nebraska court considered hazing, sexual assaults, alcohol violations, and other activities in a fraternity house near campus which led toward the hazing incident to be deemed foreseeable. Additionally, the court concluded that duty applied to activities begun on campus but the resultant injury occurred off campus owned property.

- In *Coghlan*, the Idaho court considered the presence of university personnel at a sorority pledging party and their failure to intervene in underage drinking, although not directly witnessing such use. The court held that awareness of likely drinking was sufficient to create duty and demonstrate negligence.
- In *Delta Tau Delta*, the Indiana court held that two prior incidents of sexual assault required the landlord to take reasonable care to protect against another such incident.
- In *Nallan*, the New York court considered the extent of shootings which occurred on or near the office building in the recent past. Although not a college campus case, Nallan is important in that it established the standard for landlord/invitee duty not only in New York but in other jurisdictions as well.
- In *Miller*, the New York court considered the incidence of assaults and security measures prior to the event under consideration.
- In *Nieswand*, the District Court for the Northern District applying New York law concluded that past criminal activity created a question of fact which required determination whether appropriate security measures were taken.
- In *Oja* applying New York law, the court denied the dismissal, ruling that the cause of action did not rely upon the duty to supervise the student's activities, but on the fraternity's duty to control dangerous activities of which it had knowledge.
- In a case cited by the District Court in its footnote 12, *Lloyd v. Alpha Phi Alpha Fraternity*, Nos. 96-cv-348, 97-cv-565, 1999, 1999 WL 47153, at *3 (N.D.N.Y. Jan. 26, 1999), *Furek* was cited and the court followed its analysis, except the court found that Cornell University did not have the level of knowledge of ongoing hazing that the court in *Furek* found at the University of Delaware.
- In the current case, the court should properly consider the prior actions of Paul Smith's College personnel in addressing campus student code violations, including alcohol related issues, associated risky behaviors, and driving under the influence in evaluating how such actions created and contributed to the dangerous situation on the Lake, in first applying duty and then concluding negligence.

By changing the focus to a view of all the circumstances, determining duty to track a specific individual is no longer relevant. Rather, if a view of

all the circumstances leads to the conclusion that a failure to maintain safe premises existed, an injury as a result of the safety flaws is a byproduct of that neglect of duty. Therefore, the analysis in *D'Amico* does not apply to this case since many distinctions exist from *D'Amico* and the related cases. First, while alcohol use was a factor in the extremely dangerous situation witnessed by College personnel, that was not the only, and arguably not the major, danger (such as snowmobile riding at high speeds on ice, without helmets, at night, and with an increasing fog). The use of alcohol by largely underage drinkers only exacerbated the danger. Second, the associated reckless behaviors were not undertaken by an individual, but scores of students. Rau and Guest were tragically unfortunate to suffer the consequences of the dangerous situation, but the group as a whole was at risk. Third, the reckless behaviors associated with the alcohol use was witnessed by College personnel, who were even forewarned about the hazards of driving under the influence given the recent student death in the truck accident and the reported snowmobile crash which drew them to the Lake. Finally, *D'Amico* does apply duty in situations where the "defendant may reasonably control" the outcome. The dangerous activities of the group on the Lake would have been reasonably controlled by simply requesting the presence of the State Police. Therefore, applying the *D'Amico* analysis to

this case inappropriately places the focus on one individual when the dangers were observed to exist for the entire group. Given the unique circumstances of this case, rejecting the *D'Amico* analysis does not disrupt New York law in future circumstances where *D'Amico* is properly applied.

Early Morning Ride Made Possible by All-Night Bonfire

For the Court to agree that the crash between 4:30 a.m. and 5:00 a.m. bears proximity to the out-of-control situation witnessed soon after midnight, connection to the two time periods is necessary. The facts demonstrate that the bonfire started at 9:00 p.m. on February 5 was fed continuously, with wood supplied from the College's Forestry Cabin, and remained of substantial size until extinguished by a student upon learning of the fatal crash. The bonfire remained the focus of the student party throughout the night with a continuously significant number of students present when Rau and his group returned to the bonfire early morning. Given the cold climate, the bonfire served as the focus of the students out of necessity. Even with the bonfire, students returned frequently to the campus to get warm and then ventured back to the bonfire. Given that many students described beginning their night of drinking on campus before going to the bonfire, the return to campus for warmth was also likely to include

replenishing their supply of alcohol and drinking while in the dormitories. That a party was to occur on the Lake was said to be generally known around campus. Students went to the bonfire after they either saw or heard the party from either their dormitories or campus grounds.

The bonfire also served as the focal point for the ten or more snowmobiles active during the night. The bonfire served as a point to return after completing a ride, the source of additional riders, and a place to gain warmth and socialize between rides. As previously noted, the District Court's review of the facts led it to state that the failure of the College to intervene "implied their acquiescence in the continuation of dangerous activity that was already underway." Therefore, when Marra and Shova failed to appropriately react to the dangerous scene, students present could safely assume that such activities could continue indefinitely without fear of intervention. This is in fact what occurred until the fatal crash. Although the crowd and the bonfire were admittedly smaller at 4:30 a.m., a core group of students were present throughout the night.

Given that situation, a reasonable conclusion is made that if the College called the State Police and had the fire extinguished and the students dispersed, the snowmobile activity would not have continued nor have

restarted at 4:30 a.m. The proximity of the bonfire to campus grounds and that the snowmobiles were audible on campus grounds makes a periodic revisit to the boating dock a reasonable step to provide reasonable assurance that the extremely dangerous activity witnessed earlier had not restarted.

The College argument that the return of Rau's group was to witness the sunrise, not to return to the bonfire, does not conform to the facts. Although the sunrise was noted as an attraction on the Lake in the early morning when Rau's group ventured out, no prospect of a near term sunrise was evident since their return was over two hours prior to the sunrise at 7:08 a.m. Therefore, the group would not have spent any significant time on the Lake if the bonfire was not present given the cold. Additionally, Hansen's snowmobile would not be available to borrow since the other active snowmobilers would have not remained on the Lake without a bonfire and with the possible watchful eyes of campus safety again ready to intervene. That Rau led his group to the Lake with a view of rejoining the bonfire party is evidenced by Rau's conversation with Hansen prior to Hansen preceding Rau's group to the Lake by fifteen minutes.

As the District Court notes, the failure of the College to intervene "implied their acquiescence in the continuation of dangerous activity that

was already underway." Therefore, an individual unfamiliar with the environment at the College may conclude that such activities were normal. While an otherwise cautious individual would have viewed the raucous affair that night as a warning to be cautious, once the extremes of the night had settled, that same individual, without the benefit of experiencing a like situation or snowmobile riding in the past, may well come to the mistaken conclusion that since the College seemed to not have concerns and her friends had engaged in the activities safely, that the overall situation was now safe.

The evidence shows that this view governed the actions and decisions of Guest throughout the night. Guest clearly avoided the excesses of the night with regards to alcohol and snowmobile riding. Although at least two of Rau's Pennsylvania friends had ridden snowmobiles with other drivers earlier in the night, Guest and possibly her roommate (likely because of the reluctance by Guest and an agreement to stick together) did not ride prior to 4:30 a.m. although the opportunity existed. Although Guest was the only one of the group to never have previously ridden a snowmobile, the three Pennsylvania friends all rode first. Guest tragically accepted a ride only after seeing two of her friends return safely from short rides which circled the bonfire. As the College agrees, the parties present did not view Rau as

intoxicated at the time and no evidence exists that Guest was aware of Rau's limited snowmobile driving experience.

Policymakers' view of the Campus Alcohol Practices and the College's Compliance

Further questions arise when considering the College's obligation to address related issues under federal law. Since 1989, Congress has required all institutions of higher education to address underage and excessive use of alcohol as a condition for receiving federal funding, including federally-subsidized student loans.[16] A view of all of the circumstances justifies consideration of the campus reality demonstrated by the activities on and near campus the weekend of February 4, 2005 and the College's compliance under the Drug Free Schools and Campuses regulations. The environment so evident that fatal weekend and other evidence included in the record demonstrates a campus environment much different than contemplated by

[16] Regulations Part 86 under 20 U.S.C 1011 (see Appendix-AA-34). While the court is not asked to rule on the College's compliance with this federal statute, the court properly should consider the College's repeated certification of compliance necessary to receive federal funds. Given the District Court's comment in its footnote 8, the overall campus environment revealed in the record fell well short of providing "maximum opportunities for students to live in an alcohol-free environment and to engage in stimulating, alcohol-free recreational and leisure activities." The campus environment as demonstrated in the record is not at all reflected in the required Biennial Review prepared by the College covering 2004 and 2005, nor is any reflection present in the Review as to how campus practices may be changed in response to three student deaths. The contrast between the reality on campus and the College's compliance documentation further demonstrates the lack of institutional priority with respect to student safety.

Congress when passing the statute in 1989 and reauthorizing the provisions in 1998 and 2006.

As the trial court in *Eiseman* stated, although colleges in general are not responsible for student safety, they do have a duty to supply the minimum necessary safety and security services. Paul Smith's College recognized that duty with their Office of Campus Safety. The College failed miserably the night of February 5/6th, 2005 to meet that duty. If society does not expect the College to have a duty to intervene to safeguard an individual such as Guest when confronted with the situation and choices she unexpectedly encountered with respect to the excesses of that night, when does the obligation for student and invitee safety begin?

Conclusion

In its ruling, the District Court stated that "courts have traditionally balanced such factors as 'the reasonable expectations of parties and societies generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.'" A reasonable expectation of society, especially parents, would be for a college to effectively intervene when confronted with a situation similar to

that witnessed around the bonfire. The record demonstrates that Paul Smith's College did not provide anything close to "a physical environment harmonious with the purposes of an institution of higher learning" which was in "an environment reasonably free from risk of harm" as stipulated by the lower court in *Eiseman*. The extreme uniqueness of the situation and the egregious indifference of the College should guard against proliferation of claims resulting from a reversal of the summary motion to dismiss. The insurer-like liability, disproportionate risk, and reparation allocation concerns would not be seriously disrupted. Therefore, reconsideration of this ruling is not counter to public policy concerns but rather applies the law in conformance with public expectations.

National trends see the courts striking a more reasonable balance between a college's responsibility for student safety and students' responsibility and their right to control their own behavior. For many years, the law was applied too favorably towards colleges with a resultant detrimental effect on student safety. If the Court allows this ruling to stand, New York law will be continued to be viewed and unreasonably applied to limit colleges' need to react to safety issues. Upholding the summary motion to dismiss not only is counter to the national trends striking a more reasonable balance as demonstrated by Bickel and Lake but, as demonstrated

in this brief, is counter to New York law. The ruling must be reversed to allow New York law to be viewed and applied in a more balanced manner, or colleges may well become even more secure in their indifference to student safety issues as demonstrated by the past and continuing conditions at Paul Smith's College.[17]

The plaintiff requests a reversal of the District Court's Decision and Order, Motion for Summary Judgment, and to allow the plaintiff to continue to seek appropriate damages as set forth in the compliant filed April 24, 2006.

[17] This is reflected in the May 2007 incident where many students were using boats to join a party across a lake from campus grounds. Two boats capsized with six students tossed into frigid waters, four made it safely to campus, but two underage, intoxicated students drowned. While the two who drowned paid the ultimate price, all students rowing to the party were at risk. The college was Paul Smith's College, the lake was Lower St. Regis Lake, and the party was around the reconstructed lean-to on Peter's Rock.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CERTIFICATE OF SERVICE

I, Stephen M. Guest, Administrator of the Estate of Kristine B. Guest, hereby certify under penalty of perjury that on October __, 2008, I served by United States Mail a copy of the Brief for the Plaintiff-Estate of Kristine B. Guest on Brian Breedlove, Esq. and Kevin J. Donnelly, Esq. at the following address:

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Estate of Kristine B. Guest

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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_____
Stephen M. Guest, Administrator of the
Estate of Kristine B. Guest