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

Petition for Rehearing for the Plaintiff
Estate of Kristine B. Guest

Stephen M. Guest as Administrator of the
Estate of Kristine B. Guest
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Statement of Issues Presented for Rehearing

The executor of the Estate of Kristine B. Guest respectfully petitions the Panel for a rehearing which focuses on the following considerations included in the appellant's brief and reply brief but not addressed in the Panel's decision:

1. New York premises liability decisions determine duty with a view of all the circumstances. The Panel did expand upon the facts considered to other aspects of the fatal weekend. However evidence of the College's ineffectiveness in addressing student safety issues during the preceding months as well as additional contributing factors that weekend appear not to have been accorded Panel consideration.
2. By expanding the focus to a view of all the circumstances as noted above, the reality that the College created or contributed to the dangers around the bonfire becomes clearer to the extent that either a jury should be allowed to make a final determination, or as a minimum, certification to the New York Court of Appeals is warranted to ensure the proper outcome.
3. Once the College's duty is deemed to include the dangerous activity witnessed around the bonfire as result of the created or contributed test, the duty focus is altered. New York premise liability cases,

including several cases in a college setting, consider duty based on whether the defendant took reasonable steps to address dangerous situations during the period prior to the event from which the claim arose. The District Court, as affirmed by this Panel, focused on the specific event causing injury in determining duty. The duty question rightly focuses on whether reasonable steps were undertaken to address known dangers which ultimately resulted in injury.

Argument and Authorities

Point 1-View of All the Circumstances

From the non-college cases, *Nallan* to Nash,[1] to the premises liability cases in college settings, *Miller*, *Nieswand*, and *Oja*,[2] New York courts view premises liability with a view of all the circumstances. The Panel's fact summary expanded upon the facts considered by the District Court, but focused on that one weekend, despite evidence in the record that student activities and College responses that weekend were reflective of the past. The necessary focus on the weekend of February 4 through 6, 2005 revealed

[1] *Nallan v. Helmsley-Spear, Inc.*, (50 N.Y. 2d 507; 407 N.E. 2d 451; 429 N.Y.S.2d 606) and Nash v Port Auth. of N.Y. & N.J. (2008 NY Slip Op 03991 [51 AD3d 337])

[2] *Miller v State of New York*, 62 N.Y.2d 506, 467 N.E.2d 493, 1984 N.Y. LEXIS 4411, 478 N.Y.S.2d 829 (1984), *Nieswand v. Cornell University*, 692 F. Supp. 1464, LEXIS 9147 (N.D.N.Y 1988), *Oja v. Grand Chapter of Theta Chi Fraternity*, 680 N.Y.S.2d 277, 278 (3d Dep't 1998)

multiple occurrences of questionable responses to student safety issues. Thus, one could justly conclude that similar conditions for tragedy existed those many weekends not subjected to scrutiny.

The facts included in the record essential to obtain a "view of all the circumstances" but not addressed in the Panel's decision are:

Facts in the record substantiating failures during preceding months:

- The dysfunctional safety and security staff, made so largely by their need to defer to Marra who often overrode their decisions and judgments to the extent Safety Officers felt undermined. Pl.'s. App. 59, 78, 200. This was displayed multiple times that fatal weekend.
- The frequency of alcohol violations with little indication of effectively strong response by the College, especially in designated wellness dormitories. Pl.'s. App. 112, 141.
- Given the students' perception that the safety officers lacked authority, the students repeatedly demonstrated disrespect towards those officers. Pl.'s. App. 147-149.
- Recognizing the lax enforcement of the College's alcohol polices, Judge Sharpe noted the apparent lassie fair enforcement related to campus drinking.[3]

Facts in the record during the fatal weekend supplementing the summary in the Panel's decision:

- Without the wood from the campus forestry cabin, there would be no other practical fuel source for a bonfire of any size or duration, as anyone who has attempted to accumulate wood in a frozen, snowy environment can attest. Therefore, the College could have easily closed off the source of the wood for bonfire parties if it so desired.
- As well as considering the activities around the bonfire "out of control," Safety Officer Shova also expressed that the situation was extremely dangerous and pressed Ms. Marra to contact the State

[3] See footnote 8 in the District Court's decision, Guest v Hanson. Granted, a college has no duty under New York law to enforce the code of student conduct. However, failure to enforce does provide an indication of an overall failure to maintain safe premises.

Police both while advancing to the bonfire location and upon leaving, however, was overruled by Ms. Marra. Pl.'s. App. 88, 92 to 95.[4]

- Interrelationship between the activities on campus and the bonfire party. Pl.'s. App. 65, 176, 193-194.
- That everyone on campus could be aware of the activities given that the bonfire activities were visible and audible from many parts of campus. Pl.'s. App. 201, 119, 180. Also, Toni Marra's dormitory (Lakeside Dormitory) faced the location of the bonfire and was approximately the same distance as Clinton Dorm. Pl.'s. App. 201.
- Unlike most other neighboring property which likely has the benefit of period police patrol, the College was the only authority who could possibly take appropriate action given the remote location.
- In addition to the drunken truck driver confronted the previous evening, the following demonstrates the College's disregard for the dangers of driving under the influence: 1) the likelihood that alcohol was a factor in the snowmobile accident on Saturday which brought Marra and Shova to the bonfire party, 2) the reckless snowmobile driving Shova testified witnessing, and 3) Ms. Marra's reaction to the death of a Paul Smith's student the previous weekend.[5]

Consideration of all the facts in this manner is consistent with the New York safe premises decisions whether or not concerning a college setting. All circumstances related to known past dangerous or criminal activity were considered in the safe premises cases to determine whether reasonable steps were taken to address a known danger. Consideration of all the cited facts is

[4] Since this is an important fact in this case, a significant public record of Safety Officer's Shova's role in the incident should not leave an inaccurate impression. Therefore, prudence dictates that this fact should be clarified in the Panel's decision. If his recommendations had prevailed, he would have been an unsung hero.

[5] Ms. Marra's deposition testimony chillingly illustrates her indifference and cluelessness as to the magnitude of such an event as well as demonstrating the students' disregard to the dangers of driving under the influence and the College's indifference to that disregard. Pl.'s. App. 166-169.

relevant to this determination as well as evaluating whether the College created or contributed to the dangers on the neighboring property.

Point 2- Dangerous Conditions on the Lake Created or Contributed to by the College

It's as impossible to separate the bonfire party from campus as it is to separate the campus from the source of the wood.

The Panel cites *Haymon v. Pettit, (9 N.Y.3d 324, 328-29)* as basis for refusing to apply the created or contributed to exception in *Galindo v. Town of Clarkstown*, (2 N.Y. 3d 633, 636 (N.Y. 2004). However, the College's role is distinguishable from *Haymon* in many respects.

First, in *Haymon* the injured was described as "non-patron, third persons." In this case the participants at risk around the bonfire were those who Ms. Marra was hired to oversee.[6] Nothing in the record indicates that Marra and Shova thought those around the bonfire were other than students.

Second, unlike *Haymon* where the court could not "imagine" steps available to fulfill any duty, all the College had to do was call the State Police. It worked the night before. Pl.'s. App. 78-79.

[6] This fact is implicit in various statements within the Student Handbook, especially in the second paragraph at PL App 136.

Third, illegal activities (driving under the influence and underage drinking) were witnessed around the bonfire. Those illegal activities were known to be prevalent on the campus from which it flowed.

Finally, the Panel placed great weight on *Haymon's* reference to risks that existed independent of the defendant's acts. Granted the risk of an alcohol associated snowmobile crash exists independent from the activities around the bonfire, but the same applies to an icy sidewalk and virtually any identifiable risk. The question is whether the acts of the property owner materially contributed to magnifying such risk on neighboring property. Without the demonstrated indifference by the College, the proximity and extent of activity around any bonfire party would be much less; therefore the risk of a tragic outcome would be greatly reduced.

To solidify this point, contrast the events that fatal weekend at Paul Smith's College and the adjoining lake with what would have occurred at a campus which vigorously enforced policies for student conduct. First, there would be no open party in such close proximity, audible and visible to many points on campus, to act as a magnet to attract participants who were not otherwise aware of the event. Granted, with tightened enforcement, students may opt to select a more distant location for the party which was outside the view of campus security. While this may likely occur, the event's attraction

would be diminished and the attendees limited to those diehards actively seeking such parties. Also, the ready source of wood from a campus facility is absent. The attendance, duration, and overall dangers would surely decline as well the distance being a disincentive, especially for those students not actively seeking such an outlet.

Therefore, if the College practiced the appropriate diligence on campus such that students were concerned about possible sanctions for violations, that bonfire party would not have been anywhere near as accessible, well attended and as long in duration. Furthermore, the bonfire party was surely extended once "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."[7]

While the Panel states that students around the bonfire were no worse off as result of the visit by Marra and Shova, this is not the case. After their appearance, the students could assume that the party and reckless snowmobile riding could continue indefinitely, as it did to a tragic end. Without the focus and warmth of the bonfire, there would be no focal point for snowmobile riding in the early morning, and four young women would

[7] Quotation from District Court decision in Guest vs. Hanson, District Court decision, 2007 U.S. Dist. LEXIS 92780, page 8.

not likely stand around in the cold waiting for a ride, especially one who was shown to be reluctant to ride at all.

One only needs to consider the relative caution that Kristine exhibited that night. Despite being among scores of heavily drinking students, post-mortem testing showed Kristine had minimal alcohol in her system, substantiating very limited use.[8] Although her traveling companions rode snowmobiles earlier in the evening, the fatal ride was her first ride and occurred only after she saw the others return from safe rides. If she was at all anxious to ride, she would have been one of the first to ride at 4:30 a.m. not the last. However, after witnessing seemingly safe rides and experiencing probable peer pressure, Kristine unfortunately overrode her better judgment, with fatal consequences. One can only conclude that if Kristine saw signs that the College disapproved of the activities or if the access to rides was much more remote on the lake, she would never have been placed in that position to have to make a choice.

A question which the Panel must address is whether the icy flow from the sidewalks in *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*

[8] PL App 153, third full paragraph. The fact summary in the Panel's decision leaves an inaccurate impression with respect to Kristine's alcohol consumption. A modification should be considered.

(139 AD2d 489, 526 N.Y.S.2d 847) continue to carry duty to neighboring property under the *Galindo*[9] exception. Like an icy flow from a neighboring property, an act of a property owner can well be inaction with respect to a dangerous condition on their property which flows to a neighboring property, as surely occurred with the cited dangerous activities on the Paul Smith's campus which flowed to the lake. In *Griffin v 19-20 Industry City Assoc., LLC* (37 AD3d 412 [2d Dept 2007), the answer appears to be yes. Although the court granted the defendant's summary motion to dismiss, it was because of the lack of negligence, not that the icy flow to a neighboring property failed under the *Galindo* exception.

This all leads to a conclusion that the College created or contributed to the dangerous conditions on neighboring property. *Haymon* does not provide sufficient guidance as to how the New York Appeals would apply the *Galindo* exception in this case. Therefore, the New York Court of Appeals should be given the opportunity to address whether the fact situation in this case has sufficient similarity to the icy sidewalk cases.

[9] The *Galindo* expectation refers to the extension of duty to neighboring property under the "created or contributed to" test.

Point 3- Duty is the Failure to Take Reasonable Steps to Mitigate Known Dangers, Not Solely to Prevent a Specific Injury

Once the Panel concludes that the College can be found to have created or contributed to the dangers around the neighboring property, the duty analysis must be shifted from controlling a specific individual to the failure to address a known danger. That in loco parentis applied in the past to colleges should not direct the duty analysis to duty to control an individual as in the Panel's decision. With a view of all the circumstances, the analysis must be whether reasonable steps were taken to address a known danger as typical in a safe premises determination.

Ms. Marra's acquiescence to the dangerous activities around the bonfire was only one of many demonstrated acts of indifference and neglect displayed in her role as Director of Residence Life. This one acquiescence is a central focus because of the tragic results, but the facts demonstrate that it is reflective of the recent past.

The duty to take reasonable steps to maintain safe premises has been the focus in New York safe premises decisions from *Nallan* to *Nash*[10], and the focus of *Miller, Nieswand* and *Oja*[11] in the college setting.

[10] Ibid, footnote 1.
[11] Ibid, footnote 2.

This case is much more related to these three college cases than to *D'Amico v. Christie* (71 N.Y.2d 76, 88 (N.Y. 1987)) and *Heard v City of New York* (82 N.Y.2d 66) and their focus on control. This point is best illustrated by a review of the relevant cases.

In *Nallan*, repeated criminal activity in a union hall lead to a duty to provide adequate security. The breach of duty was not when the plaintive was shot, but the breach was the lack of diligence during the period leading to the event. Likewise in *Nash*, the breach of duty by the landlord of the World Trade Center was not the 1993 bombings, but the failure of the landlord to properly guard against such an attack given the prominence of the complex.

The same approach applied in the *Miller*, *Nieswand*, and *Oja* decisions. In *Miller*, after several reports of unattended strangers in dormitories, the court held that the college had a duty to keep doors locked, which it failed to do. The finding of duty was not the failure to stop the specific resultant rape, but the failure to take reasonable steps to address a known dangerous condition. A similar analysis was used in *Nieswand* where duty was found to react to repeated incidents of criminal activity which preceded a murder in a college dormitory. Again it was not that the college failed to stop that specific murder, but the failure to take reasonable

steps to maintain safe premises during the period leading to the murder. Finally, in *Oja* which involved an alcohol induced death during a fraternity's hazing activities, the court held breach of duty for the fraternity's failure to control dangerous activities it knew were taking place on its property and not on the fraternity's duty to supervise the excessive alcohol consumption of a specific pledge.

While some may not consider driving under the influence at the same level as assaults and rapes, the result of drunken driving is often as serious and can involve criminal charges. Ms. Marra demonstrated her indifference to the dire consequences of driving while intoxicated many times that weekend. That these repeated failures to take effective action occurred only one week after another student died while driving under the influence (Ibid, footnote 5) further reflects that indifference.

Finding duty in this manner is distinct from attaching duty to an intoxicated driver travelling on a public road. The neighboring property was one that the College effectively treated as its own. Furthermore, its remote location and the lack of any other authority in position to intervene when such activities *were witnessed* broaden the distinction.

Marra's indifference to known dangers must be considered similarly to the failures in *Miller, Nieswald, and Oja*. Upon review of all the

circumstances, one can only conclude that conditions were present for *an accident waiting to happen* with Joshua Rau and Kristine as the unfortunate victims of Marra's indifference and acquiescence to activities in which as many as 100 students were left at risk.

Does New York law dictate that premises liability duty in college and alcohol related cases use the duty to control an individual standard? *Miller* and *Nieswand* make clear that this is not required in a college setting. Furthermore, *Oja* does not use the duty to control analysis in a situation that involves both a college setting and alcohol. *Oja* has much in common with *Furek v. University of Delaware*, (594 A.2d 506 Del. 1991) and the other non-New York cases cited in the appellant's brief.

CONCLUSION

The defense counsel's troubling response during oral arguments regarding a college's lack of duty to stop a witnessed rape is both morally and legally wrong. Unfortunately, that incorrect perception is reflective of the advice provided to colleges given the nature of student injury decisions.[12] Colleges effectively become bystanders with respect to student safety, as

[12] See page 11 & 12, *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), where the authors make the same point stating in part: "The message was that it was better not to get too involved or to "assume" duties to students."

was the case at Paul Smith's College. The Panel's decision, rendered despite obvious egregious acts by the College, will only solidify such advice at the cost of more assaults, injuries and deaths of our youth.

While New York courts aim to limit the scope of negligence claims, decisions are often sufficiently flexible to allow for the appropriate finding of duty in egregious situations. Such is the case with both *Eiseman v. State of New York* (70 N.Y.2nd 175, 190 (1987)) and *Galindo (Ibid. footnote 9)* which did not provide no-exception rules regarding responsibility for student safety in *Eiseman* and limiting duty to one's own property in *Galindo*. The egregious facts surrounding the actions and inaction of Paul Smith's College should allow the exception in *Galindo* to apply in this case without the concern of inappropriately expanding the duty standard.

If the Panel again denies the New York Court of Appeals the opportunity to determine whether the duty to guard against a known danger on its property carries to unsupervised adjoining property even when such danger is witnessed, the effect will not only deny the opportunity to have justice served in this case, but could also be devastating to the well-being of our best and brightest young adults throughout New York and elsewhere.

The Panel is respectfully requested to grant rehearing to address these important issues.

Respectfully submitted,

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Stephen M. Guest Administrator
of the
Estate of Kristine B. Guest

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 April 29, 2010, I served by United States Mail a copy of the Petition for Rehearing 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