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

Reply Brief for the Plaintiff-Estate of Kristine B. Guest

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Dated December 11, 2008

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Reply to Defendant-Appellees' Statement of Facts

Despite the College's statement of facts being presented in the most favorable manner for the College, little appears in their recitation that reflects favorably on the College or Toni Marra. The District Court's statement of facts places the College's actions in a much less favorable light. As the District Court noted: "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 already underway."[1]

The plaintiff requests the Court to consider the totality of facts, both during the time period prior to the night of the fatal crash and on the night of February 5/6, 2005. Such complete recitation of the relevant facts confirms that the District Court's strong statement referring to acquiescence to reckless and dangerous activities was justified, not only the night of the fatal crash, but also during the preceding months. Indifference to student safety is evident to the extent that an independent observer could only conclude that an accident was waiting to happen. Joshua Rau and Kristine Guest were the unfortunate victims.

[1] See page 15 of the District Court's decision. Note that the District Court completely discounted Marra's contention that she instructed the students to "wrap it up," a contention not supported by any other deposition or sworn statement provided to the State Police, but continued to be a central aspect of the defendants' recitation of facts. A more complete account, consistent with the overall record, appears in the appellant's brief.

In a motion to dismiss, courts must weigh the facts in the manner most favorable to the plaintiff. The defendant's Statement of Facts contains many assertions which were not consistent with other statements included in the record. Most noteworthy are:

- Although a statement was made that the bonfire gathering was not audible from inside a dormitory, numerous individuals confirmed that the bonfire was visible and the activities audible from many locations on campus grounds.
- The extent of fog at various points during the night is inconsistent between and within statements. Hansen's own statement referred to seeing lights in the cabins across the Lake. Hansen and others described the fog as less intense at the time of the crash.[2]
- The College chose the most distant reference in describing the proximity of the bonfire to campus which conflicts with many other accounts and with photographs in the Appellee's Appendix.
- Again the College misquotes the student's statement regarding students appearing intoxicated. The statement was "overly intoxicated."
- The references to the size of the bonfire size at 4:30 a.m. conflicts with many others who confirmed that the bonfire was smaller but still substantial and continuously fed until after the crash.
- Rau's friends stated that they did not see the helmets, and Hanson testified that he did not offer the helmets to them.
- Absent was any reference to Safety Officer Shova's statements, which conflicted with Marra's testimony on many significant points. Shova's version is consistent with other statements and documents included in the record.

[2] A comparison of the sworn statements given to the State Police the day after the crash and the various deposition testimonies indicate that the memory of the fog grew foggier through time. The extent of fog in the deposition testimonies generally was more intense both earlier and later than the conditions as described to the State Police. The cited references to the early morning likely applied to certain areas near land where a mist lingered, substantiated by other statements in the record that the area in the center of the Lake was clear.

In the appellant's brief, the facts, as supported by the record, are detailed in a manner to allow a view of all the circumstances. This complete view is necessary to properly determine the College's responsibility for the tragic results.

Reply to Defendant-Appellees' Summary of Argument

The College's argument effectively concedes that the dangers witnessed by Marra and Shova around the bonfire were foreseeable. However, the College fails to counter the cited evidence in the record of the College's demonstrated indifference for student safety that created and/or contributed to the dangerous conditions on neighboring property. Therefore, the special relationship to the students that the College as property owner and landlord had on campus carried to the Lake upon Marra and Shova witnessing the dangerous activity around the bonfire. The facts require that the exception in *Galindo*[3] be considered in extending the College's duty to maintain safe premises to the events associated with the bonfire.

The Court is requested to place the focus on current law related to a college's responsibility for student safety rather than the decades-old rejection of in loco parentis ago as preferred by the College. As even the

[3] *Galindo v. Town of Clarkstown*, 2 N.Y. 3d 633, 636 (N.Y. 2004)

case solidifying that rejection held, colleges have an ongoing responsibility to maintain safe premises and employ a security force towards that end. That is how the facts and relevant law should be analyzed in this case. With this focus, one can only conclude that Paul Smith's College's Safety Office was not allowed to fulfill the safety function as set forth by *Eiseman.*[4]

ARGUMENT

POINT I

PAUL SMITH'S COLLEGE DID OWE KRISTINE GUEST A DUTY OF CARE THAT GIVES RISE TO LIABILITY

A. Duty to Supervise

The College misstates that the plaintiff argues "that the relationship between a college and its students gives rise to a duty to supervise." A duty to supervise is not central to duty under a special relationship that a landlord and/or a premise owner owe to its invitees including the duty to react with reasonable care with respect to a foreseeable danger. Nothing in the duty under that special relationship implies the duty to supervise which the

[4] *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. A detailed discussion appears in the Appellant's Brief pages 27 & 28.

defense wishes to continue to place the Court's focus. In loco parentis has been rejected in New York and most other jurisdictions. However, as the appellate and lower courts in *Eiseman*[5] both hold, colleges and universities are far from completely removed from any responsibility for campus safety.

Repeatedly, the College focuses on the rejection of in loco parentis but fails to address the standard established by the lower court in *Eiseman* and accepted by the appellate court that a safety force is employed to maintain "a physical environment harmonious with the purposes of an institution of higher learning (decision quoted further in appellant's brief, page 28)." The appellee has failed to address the plaintiff's contention that Marra's undermining of the Safety Officers thwarted the stated goal in *Eiseman*.

Additionally, the defense focuses on the fact that the bonfire was on neighboring property without addressing the 1) interrelationship between the activity on campus and that on the Lake and 2) that Marra's demonstrated indifference to student safety on campus can only lead to a conclusion that the College created and/or contributed to the dangerous conditions on the

[5] Ibid, and *Eiseman v. State of New York*, 70 N.Y.2nd 175, 190 (1987)

Lake. Therefore, the exception noted in *Galindo*[6] extended the College's duty to the Lake when College personnel witnessed the dangerous scene.

The appellee cites *Lauer v City of New York*[7] as limiting duty to a specific individual, not society as a whole. However, *Lauer* also states: ""we have consistently refused to impose liability for a municipality in performing a public function absent "a duty to use due care for the benefit of particular persons or classes of persons."" The College as landowner and landlord has duty under a special relationship to a specific class under New York law, commonly called invitees. This clearly would include all students and guests. 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. Therefore, upon concluding that the exception in *Galindo* applies, *Lauer* adds support to assigning duty to the entire group at the bonfire rather than rejecting that approach. The prime concern expressed by courts is initiating a proliferation of claims by an expansion of limits to where duty is assigned. This in not a concern in this case since duty in safe premises cases is well defined and not expanded by assigning duty to the group attending the bonfire party since it was limited and identifiable. The

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[6] Ibid. footnote 3

[7] *Lauer, Respondent, v. City of New York,* 95 N.Y.2d 95 (2000)

defense's augment also conflicts with *Palsgraf v. Long Is. R.R. Co.* (248 N.Y. 339, 344, 162 N.E. 99 [1928]) which holds that when a destructive force is released and pursues an unexpected path, the duty to guard against such foreseeable danger is not eliminated. Therefore, neither the nature of the harm, nor the specific individual harmed need be previously identified for duty to be assigned.

Additionally, the focus on the overall danger in hazing activities in contrast to the control over a specific individual was the basis for rejecting a summary motion to dismiss in *Oja*[8].

B. College Defendants Voluntarily Assumed a Duty

While the appellant's brief does not address the possibility that the College assumed a duty by going to the bonfire and does not rely on this approach, the raising of the argument by the College warrants a response. 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, the District Court concluded that when Marra and Shova failed to appropriately react to the dangerous scene, students present could safely

[8] *Oja v. Grand Chapter of Theta Chi Fraternity*, 680 N.Y.S.2d 277, 278 (3d Dep't 1998)

assume that such activities could continue indefinitely without fear of intervention. This is in fact what occurred until the fatal crash. Although Rau's group may not have directly arrived at that assumption from Marra's and Shova's presence, the students maintaining the bonfire and riding the snowmobiles certainly did. This acquiescence by Marra allowed the bonfire and snowmobile riding to continue uninterrupted until 4:30 a.m. providing Rau with the opportunity to borrow a vehicle and offer his friends rides.

Given the duty of the College to maintain safe premises, the Court should find duty without venturing into the question of whether the College voluntarily assumed duty. However, given the facts, the student group as a whole, including Rau and his friends, were placed in a worse position after Marra's and Shova's visit. An element of uncertainty as to how long into the night the party could continue would have existed without Marra's acquiescence of the ongoing activities. The plaintiff does not rely upon this theory but welcomes the Courts further consideration.

The College relies upon *Heard v City of New York* (82 N.Y.2d 66). However, *Heard* is clearly distinguishable in that the plaintiff Heard, while diving off a jetty, had "familiarity with the area based on immediate experience." "In fact, Heard exhibited his appreciation for the hazards involved by employing a shallow-water racing dive." Therefore, the court

did not assign duty when Heard took one last dive after the lifeguard instructed Heard and his friends to leave.

The actions of the College and Guest were much different. As the appellee states in its brief "the College defendants did not take any action to stop the bonfire or snowmobiling" (page 22).[9] Guest's experience and actions were also much different from Heard. Guest had no prior experience with snowmobiles as evidenced by her reluctance to ride earlier that night. Although her companions previously took rides, Guest did not. When Rau borrowed Hanson's snowmobile, Guest watched her three companions take safe, uneventful rides before she finally accepted. Unlike *Heard* who was repeatedly diving and had been warned by the lifeguard of the dangers and adjusted his dive accordingly, Guest had no other source of reference other than her friends' assurance of safety and the apparent approval of the College, given the activity's proximity to campus for the past six hours. Therefore, Guest, like all students present at the bonfire with limited snowmobile experience justifiably took assurance in the College's acquiescence in concluding that the ongoing activities were safe.

[9] The College makes this statement despite the inclusion in their Statement of Facts that Marra instructed the student snowmobilers to "wrap this up" and subsequently retired assuming her intervention was successful (page 13 of the defendant's brief). Seemingly, consistency between cited facts and argument is appropriate concerning such a significant point.

C. College's Duty to Maintain Safe Premises

The defendant's sole argument to counter any duty under the obligation to maintain safe premises centers on the fact that the bonfire was not on College property. The entire argument fails with application of the exception in *Galindo*[10] which extends duty to neighboring properties if a property owner created and/or contributed to the dangers on adjoining property. A total view of the circumstances can only conclude that when College personnel witnessed the dangerous activities around the bonfire, the College's duty to maintain safe premises extended to the Lake as result of the College's past indifference to student safety, thereby distinguishing this case from the cases cited by the defense.

When a government enacts a law or an organization establishes a policy or a rule, compliance with such standard is dependant upon the extent of enforcement. If a law prohibits sexual harassment or discrimination, adherence to such standards correlates with the seriousness of those responsible to enforce that law. If use of a cell phone while driving is prohibited, drivers will still have their telephone to their ear without

[10] Ibid, footnote 3

enforcement. If a college gives implied acceptance to underage and excessive alcohol use on campus, such practices will likely be prevalent and more out in the open.[11]

While New York law does not extend to a college the duty to enforce its established policies, New York law does find a duty to maintain safe premises when lack of effective enforcement is such that a known hazard exists. While New York law fails to assign duty to enforce a college's student code of conduct related to alcohol use, duty is found when such use is associated with a dangerous activity such as hazing. The court in *Oja*[12] 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."

The College's overall acquiescence to prohibited student alcohol use is most evident in the boldness of the students in selecting the location of the bonfire for the party. The bonfire was approximately 200 feet from the campus near the boat launch located at one of the most prominent areas on campus. The location of the bonfire allowed visibility from campus to draw

[11] On page 28 of the appellee's brief, concern is expressed that any increased obligation placed on a college to enforce the institution's alcohol policies may well cause such institution to decide to not have any such rules at all. The Court should recognize that such a result is unlikely since elimination of all alcohol policies in the code of student conduct would result in loss of federal funding including federally subsidized student aid (IRC 20 U.S.C. 1011(h).)

[12] Ibid, footnote 8

students and easy access to and from campus which was necessary in the frigid climate. Such proximity drew as much as ten percent of Paul Smith's College's student population. Therefore, the lone fact of the bonfire's location provides sufficient cause to consider the remainder of the evidence presented towards concluding that the College did indeed create and/or contribute to the reckless and dangerous combination of activities on the Lake. Thus, once College personnel witnessed the dangerous activities, the exception to the finding in *Galindo* applies to extend the College's duty to maintain safe premises to the Lake.

With respect to the immunity under § 9-103, the physical suitability of the area for snowmobile use is not at issue. If the Court finds that the College's duty to maintain safe premises extended to the Lake, such conclusion would result from not the physical aspects of the Lake but from the College's past lax enforcement of campus policies and demonstrated indifference to student safety. This was again reflected in the foreseeable danger created by allowing scores of drinking students to have a party on the Lake with accompanying snowmobile use. The immunity protection for recreational landowners was not intended to extend immunity to acquiescence to driving snowmobiles while under the influence and other unsafe activities. As detailed in the appellant's brief, Marra and Shova went

to the bonfire in response to a reported snowmobile crash involving students. The dangers associated with reckless activities were both obvious and forewarned.

Although the College's duty is extended to the Lake under through the *Galindo* exception, the College is not an owner, lessee, or occupant of the Lake, thereby making the immunity provisions of § 9-103 inapplicable. Additionally, courts have ruled § 9-103 inapplicable when the negligence asserted is not with respect to the physical suitability of the property for the recreational purposes, but rather the actions of the defendant. The purpose of the statute would be expanded well beyond its original purpose if applied to this case. [13]

Additionally, an exception to immunity exists under § 9-103(2)(a) which states: "this section does not limit the liability which would otherwise exist for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." The College's indifference to student safety appropriately fits within this exception without defeating the purpose of the statute. The statute cannot be read to provide immunity to landowners who allow individuals, to whom they owe duty, to drive recreational

[13] See *Terry Blair, as Administratrix of the Estate of Christopher Blair, Deceased, et al., Plaintiffs, v Newstead Snowseekers, Inc.*. (2005 NY Slip Op 25008; 6 Misc. 3d 843; 788 N.Y.S.2d 569; 2005 N.Y. Misc.) and. *Lee v Long Island R.R.* (1994, 2d Dept) 204 App Div 2d 280, 611 NYS2d 296

vehicles while intoxicated.[14] Therefore, the immunity under § 9-103 does not apply.

POINT II

Case Law from Other Jurisdictions Presented to Demonstrate Similarity in Approach and Result with New York Law

Cases from jurisdictions other than New York were cited in the appellant's brief to present the Court with a view of the development of cases subsequent to the widespread rejection of in loco parentis. Those cases demonstrate that an institution's responsibility for student safety did not end upon the rejection of in loco parentis but rather has taken a form consistent with the duty standard applied to landowners and business establishments to maintain safe premises with appropriate consideration for the demographics of a college community. Additionally, several New York cases were cited in the appellant's brief to demonstrate how the courts' application of New York law is consistent with the findings in those out-of-state cases. The College would like to focus the Court's attention back to the pre-1980's concepts regarding student safety. Therefore, the College

[14] Refer to the appellants' brief's Statement of Facts (page 16 of the brief and Appellant's Appendix page AA.-73) where Marra stated that she assumed the students at the bonfire were drinking and Shova recognized the dangerous situation where drinking students were likely driving snowmobiles (see AA.-93).

does not address the cited New York decisions, *Miller, Oja,* and *Nieswand,*[15] since those findings under New York law are not helpful to their central argument.[16]

In *Oja*, the deceased was involved with a pledging activity where he was encouraged and instructed to consume large amounts of alcohol, from which he passed out and eventually died. The court recognized that the defendant fraternity did not have a legal duty to supervise those present. However, the court found sufficient evidence that the fraternity knew these dangerous activities were occurring and had sufficient control over the situation to apply duty for failure to maintain safe premises.[17] Therefore, New York courts clearly assign duty to use reasonable care to prevent injury when alcohol is a contributing factor to dangers inherent with associated reckless activities, such as hazing as in *Oja* or driving snowmobiles by students who college authorities assumed were drinking.

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[15] *Miller v State of New York*, 62 N.Y.2d 506; *Nieswand v. Cornell University*, 692 F. Supp. 1464; *Oja*- Ibid. footnote 8.

[16] Note that the defense misstates the facts in *Knoll* by stating that the fraternity house was on campus property. As the Nebraska court in *Knoll* stated: "It is true there is no evidence that any of this activity occurred on the University's property. However, there is evidence that the FIJI house is located near the University's property. In *Doe v. Gunny's Ltd. Partnership, supra* , we determined that evidence of criminal activity, including assault and larceny, occurring near the landowner's property was relevant to our foreseeability analysis." (*Knoll v. Bd. of Regents of University of Nebraska*, 601 N.W.2d 757 (Neb 1999)). Therefore, the College's analysis distinguishing Knoll from this case is faulty.

[17] Ibid. footnote 8

As in *Oja,* both *Miller* and *Nieswand*: 1) addressed dangerous conditions which placed the academic community as a whole at risk, rather than the specific individual injured; and 2) applied a view of all the circumstances analysis. A comparison of these cases decided under New York Law with the related cases from other jurisdictions cited in this appellant's original brief reveals consistency in fact pattern, the courts' analysis, and eventual outcome.

Proper application of New York law requires that *Oja, Miller* and *Nieswand* be considered and applied to the present facts. The negligence by the College is even more egregious than the cited cases since College personnel witnessed and recognized the specific dangerous activities only hours prior to the tragic event.

Conclusion

Reversal of the summary judgment to dismiss is justified based on the duty to take reasonable steps in maintaining a safe campus environment. Requiring the College to supervise student behavior is not necessary to find duty. Thus upon reversal, the College will not be held responsible to supervise and control students, to ensure that no illegal alcohol use takes place, nor to prevent every incident of associated risky activities by students;

but only to take reasonable steps to maintain a safe environment. Consequently, when a college has knowledge of or is witness to an obvious foreseeable danger, reasonable steps are necessary to effectively intervene.

Eiseman and subsequent decisions require that safety measures be present to allow "a physical environment harmonious with the purposes of an institution of higher learning." Reasonable approaches to enforce alcohol and other substance abuse policies are an essential element in achieving such an atmosphere. Congress recognized this with its 1989 legislation.[18] As the record demonstrates, Paul Smith's College's laissez-faire attitude to student alcohol use was reflected in administrative indifference to other student safety issues, such as students driving while under the influence, for both on-road and off-road vehicles.

The following summarizes how the evidence demonstrates that the College created and/or contributed to the situation that led to tragedy:

- The lax enforcement created an environment where drinking was common on campus with confiscation as the major consequence.
- Safety Officers' efforts were often undermined by Marra with everyone having their own approach to an alcohol incident. Confused lines of authority further undermined the efforts of those responsible for student safety.
- Students realized the College's jurisdictional limitations on the Lake and regularly used the Lake as a safe haven for their illegal drinking and associated risky activities.

[18] 20 U.S.C. 1011(h)

- One student described obtaining wood for the fire from the College's Forestry Cabin inferring a frequent source for bonfire fuel. The availability of the wood without question demonstrates further acquiescence by the College of activity on the Lake.
- As evidenced on the night of the tragedies, the activity on the Lake is closely related to similar activities on campus, primarily within the dormitories.

Furthermore, once creating an environment where large bonfire parties in full view of campus grounds were determined appropriate by such a significant portion of the student population, the College's indifference to student safety and responsibly for the tragic outcome is evidenced as follows:

- While at the bonfire, Marra had no intension of determining the extent of alcohol use around the bonfire, given her instructions to Shova and her stated assumption that the students were drinking. Therefore, her observation that alcohol use was not apparent carries little weight.
- Marra's acquiescence to the activities allowed the bonfire to continue as long as the students endured. Marra chose to acquiesce despite the death of an intoxicated student in a truck accident the previous week and the possible injuries from a prior snowmobile crash earlier that night.
- Given the College's isolated location, no authority was in position to exercise control over the Lake without being alerted. The College had both the opportunity and means to intervene by simply contacting the State Police. However, the College chose to acquiesce to the dangerous activity that the College itself created.
- Without the bonfire as a focus, the four or five students driving snowmobiles would unlikely to have been active through 4:30 a.m.
- Without the bonfire, Rau's group would not have ventured to the Lake at 4:30 a.m. to either see a sunrise occurring over two hours later or to give individuals snowmobile rides while the others stood in the frigid cold without the benefit of the bonfire for warmth.
- Without the bonfire, there likely would not be a snowmobile available for Rau to borrow if he were still so inclined.

- If the College had exercised reasonable care and called the State Police to intervene, Rau and Guest would be with us today.

Even *Eiseman* recognized the continued responsibility for student safety subsequent to in loco parentis' rejection. That court's approach is consistent with the balance between students' rights and responsibilities and colleges' responsibility for student safety central to Professors Bickel and Lake's treatise.[19] However, the evidence shows that Paul Smith's College does not fully recognize that responsibility. The Court now has the opportunity to ensure that Paul Smith's College and other institutions with a similar attitude acknowledge and accept that duty.

The primary issue of law is whether the facts demonstrate that the conditions on campus were such that the dangerous activities on the Lake were created and/or contributed by the lax enforcement of alcohol and other safety related policies on campus. The record contains sufficient evidence for this to be reasonably concluded. As the District Court stated in 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." Such determination of material fact is at trial which precludes upholding the summary judgment to dismiss.[20]

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[19] *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

[20] Federal Rule of Civil Procedure-Fed. R. Civ. P. 56(c).

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 December 11, 2008, I served by United States Mail a copy of the Reply Brief for the Plaintiff-Estate of Kristine B. Guest on Brian Breedlove, 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 4,558 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in a 14 point using the Times New Roman font.

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