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Indiana Supreme Court Examines Civil Liability of Fraternity and University for Hazing

Today we return to the topic of a university's and a fraternity's liability for injury caused as a result of hazing. We previously discussed the Indiana Court of Appeals decision in *Yost v. Wabash College* back in October 2012. The *Yost* case, progressing past the court of appeals, found its way into the Indiana Supreme Court. Due to the Supreme Court's decision to review the case, the court of appeals' decision has been vacated, pursuant to Indiana Appellate Rule 58. As a result, we return to our prior discussion with a focus on this week's Indiana Supreme Court decision in *Yost v. Wabash College*.

Without reinventing the wheel, I will rely upon the description of the facts that I used in the discussion of the court of appeals' decision.

> In the early morning hours, Yost, a freshman pledge, and other pledges decided to "creek" an upperclassman brother to celebrate the upperclassman's 21st birthday. According to the court, "'Creeking' involves taking a brother to be submerged in nearby Sugar Creek and is generally done to celebrate either his engagement or his twenty-first

> birthday." Once they had creeked that brother, they sought to do the same to another brother who was on the verge of departing to study abroad. Yost and his cohorts were unsuccessful in their second attempt and a wrestling match between Yost and the brother – Schmutte – broke out. Schmutte opted to seek retribution against Yost by "showering" him. "Showering" involves tossing a frat brother into a shower and running the water. While Schmutte and a few other upperclassmen brothers were dragging Yost to the shower, another brother joined in on the fun. The additional brother – Craven – put Yost into a chokehold. The hold caused Yost to go limp whereupon the brothers carrying Yost panicked and dropped him. In a scene that must have resembled the infamous incident between Hulk Hogan and Richard Belzer that left Belzer unconscious in a pool of his own blood, Yost suffered both physical and mental injuries that ultimately compelled Yost to withdraw from school. I will note, he re-enrolled at Wabash the following fall and, not having learned his lesson, re-pledged the fraternity. Again, he was unable to complete the semester.

An additional note, built upon the premise that some may be unfamiliar with Wabash College – a doubtless shocking proposition to Wabash men – is that Wabash is a private all male liberal arts college in Crawfordsville, IN. It is well respected as an academic institution in the state. It is also a school in which fraternity involvement is extremely high – 51% of enrolled students in fraternities.

Ultimately, Mr. Yost filed suit against the college and both the local and national chapters of ΦΚΨ (Phi Kappa Psi). The trial court granted summary judgment in favor of all three defendants. On appeal, the court of appeals returned a split decision. The majority affirmed the trial court in full. However, Judge Vaidik, who has since assumed the position of chief judge of the Court of Appeals, concluded that there were factual issues precluding summary judgment in favor of the college and the local chapter. As a prefatory matter, the standard for awarding summary judgment is that there are no contested issues of material fact that would allow a jury to find otherwise. As such, Judge Vaidik's conclusion was not that Wabash College was liable. Rather, she concluded that there were unresolved factual issues that could potentially lead to a finding of liability.

The Supreme Court, like the court of appeals, ultimately returned a split decision. The task of authoring the majority opinion was carried out by Chief Justice Brent E. Dickson. In tackling the task, the court took each defendant separately. Though the court of appeals had to consider each defendant independently, its analysis was guided in format by theories of recovery: (i) premises liability; (ii) assumption of duty; and (iii) vicarious liability. The Supreme

Court, on the other hand went defendant by defendant. The first defendant on the block was Wabash College. In keeping with the higher court's format, we shall do the same here.

I. Wabash College

The basis for the college's motion for summary judgment was: "(a) it did not have a duty as a college or as a landlord to protect Yost from Cravens' alleged negligence or criminal attack; (b) it is not subject to vicariously liability for the actions of any co-defendant; and (c) Yost's claim for punitive damages fails as a matter of law." The court first examined whether the college owed a duty to Mr. Yost as a landlord through premises liability. The majority opinion concluded that there was no duty under premises liability. The single dissenter – Justice Robert D. Rucker – disagreed.

The majority decision hinged upon the conclusion that Wabash had relinquished control over the premises to the fraternity. As the majority recognized, "When the landowner is a lessor and the lessee is in operational control of the premises, such duty rarely exists. A landlord under many circumstances has no liability to tenants or others for injuries on the property when the tenant is in full control of the leased premises." It was undisputed that Wabash owns the fraternity home and that it leased the premises to the local chapter. The majority, finding that Mr. Yost produced no evidence to rebut this evidence, found that Wabash was not liable as a landlord.

Justice Rucker's dissent hit upon what seems to be a major weakness in the majority's conclusion. He concluded that the college had failed to meet its summary judgment burden. As we've noted before, Indiana's summary judgment procedures differ in a very meaningful aspect from the federal procedures. In Indiana, the burden on the party seeking summary judgment is higher. As the court of appeals explained in *Kader v. State*, ""The initial burden is on the movant to 'designate sufficient evidence to foreclose the nonmovant's reasonable inferences and eliminate any genuine factual issues.'" The federal rule does not require the moving party to proactively rebut arguments not yet made by the nonmoving party. In federal court, the movant need only "inform the court of the basis of the motion and identify relevant portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'"

Justice Rucker concluded that Wabash had not proven a crucial issue: whether the fraternity was in **full** control and possession of the leased property. As the majority's own citation recognizes, the key is that full control has been transferred. The majority found, "Even if Wabash, as owner and landlord, retained

a limited right of entry (of which there is no evidence here), such arrangements do not serve to 'defeat the transfer of control and possession of a leased premises to the lessees of that premises.'" While this would seem to be sufficient to rebut Justice Rucker's view, I don't think it actually is. Justice Rucker's conclusion was one of procedure, not of application of law. Justice Rucker recognized that the burden of the moving party – here the college – is to demonstrate the existence of material facts to foreclose the control issue. The only evidence relied upon in the majority opinion, and it seems the only evidence adduced at all about the factor of control was that Wabash had leased the property to the fraternity. This is not proof that the fraternity was in full control. It is proof that the fraternity is in at least partial control. As this is a dispositive and material issue, the burden was upon Wabash to foreclose reasonable inferences on behalf of the nonmoving party – here Mr. Yost.

It is quite reasonable to infer that a college with a strict ethics code has enough control to not only periodically enter the property but to do so and to act in a disciplinary fashion. For example, I would be absolutely shocked if Wabash College personnel could not enter any fraternity at any point and check for instances of underage consumption or sexual misconduct. Further, if the personnel recognized a safety hazard – like an overloaded electrical outlet – they could probably order that to be remedied. If these facts are true, as it seems reasonable to imagine that they would be, then the control would seem to be much less than full.

It merits note that while Justice Rucker's and Chief Judge Vaidik's dissents agreed in outcome, they substantially differed in their bases. Chief Judge Vaidik's dissent focused upon assumption of duty and whether the college's lax treatment of hazing had resulted in an assumption of duty. She stated, "Instead of taking a hard line against hazing, a reasonable inference from the designated evidence is that Wabash even encouraged such behavior by doing such things as failing to recognize hazing as hazing, promoting drinking during class and drinking with campus security, and failing to enforce the Gentleman's Rule." Interestingly, though her contentions seem highly meritorious, Justice Rucker did not pick them up.

The majority opinion next turned to whether the school had assumed a duty. Mr. Yost's primary argument on this theory was that the college had "undert[aken] actions which support the inference that it assumed a duty to protect Yost from activities like those that led to his injury, specifically, Wabash's enforcement of a strict policy against hazing and use[of] the 'Gentlemen's Rule' to guide student behavior." The "Gentlemen's Rule states, "The student is expected to conduct himself at all times, both on and off the campus, as a gentlemen and a responsible citizen." In support, Mr. Yost cited to the school's "general policy against hazing, procedures for reporting and disciplining students and fraternities that violate the policy, several investigations and resulting discipline for violation of the policy, and

the promulgation of the Wabash 'Gentlemen's Rule' as a guide for student behavior." The court found that to be "no more than a general intent to elicit good behavior from and maintain general order among the student body." Seemingly determinative for the court was that the college did not take actions to directly oversee and control individual members of the local fraternity.

The court summarized,

> Expressed another way, there is no direct evidence or reasonable inferences in this case to establish that Wabash deliberately and specifically undertook to control and protect Yost from the injuries he sustained or to generally prevent its students from engaging in injurious private conduct toward each other. Nor is there evidence that Yost in any way relied upon Wabash to take action in furtherance of the claimed gratuitously assumed duty.

The second point, that there is no evidence that Mr. Yost relied upon the school's efforts answers the concern I raised in discussion of the appellate decision. I wrote:

> I must digress from my discussion of the opinion for a moment. To find that the school did not assume a duty because its enforcement was reactionary seems ludicrous to me. Though, the result may be sound, the court never addressed whether Mr. Yost knew that the enforcement was reactionary. The premise for assumption of duty is based in two things: (1) the person who is injured has allowed himself to be in a position to be injured because he reasonably believed that there was one who had a duty to come to his aid; and (2) the person who has assumed the duty to come to the aid of another or to protect him/her by doing so has dissuaded someone else from coming to the aid of the person. This is a case that ought to have addressed the first premise. Did Mr. Yost reasonably believe that the school was going to protect him from hazing? I cannot say whether he did or did not. However, the court never addressed this point.

Like I said, the court here seems to have answered my concern and found it cut against Mr. Yost.

The last theory of liability against the college was that of vicarious liability – that is holding a person or entity liable for the actions of another. This is typically found in the context of agency law. For example, a corporation is a legal fiction. Wal-Mart is no more real than a name on a piece of paper. It cannot sell goods or collect carts from the parking lot without having employees to act on its behalf.

These employees are agents of the company. Thus, any time Wal-Mart is liable for the actions of an employee, it is because of vicarious liability. Though the court dedicated a fair amount of text to the discussion of this theory, the conclusion was that there was no basis to show that the agent – here the local chapter of the frat – was acting on the behalf of the college. Further, there was no manifestation by Wabash that the frat would be acting on its behalf. Consequently, there was no basis for vicarious liability. Thus, the majority concluded that the trial court correctly awarded summary judgment in favor of Wabash College.

II. The National Chapter

Mr. Yost asserted the same theories of liability against the national chapter of the fraternity as he did against Wabash College. The designated evidence showed that the national chapter "strongly disapproved of hazing," including the promulgation of insurance risk guides indicating a prohibition on hazing. In order to determine whether a duty exists where one has not previously been recognized at law, an Indiana court will consider three factors: "(1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns."

The court found that public policy concerns and the relationship of the local and national chapters did not favor the finding of a duty. The primary thrust was that the national chapter did not exercise control over individual chapters. The court also rejected an assumption of duty argument for the same basic reasons it did for Wabash. Chiefly, even though the national chapter took efforts to discourage hazing, it did not exercise control over the local chapter. Likewise, the court also rejected a finding of vicarious liability on the same basic grounds.

III. The Local Chapter

Unlike the other two defendants, the court disagreed with the court of appeals' majority and concluded that the local chapter did not merit summary judgment. Mr. Yost argued that the liability of the local chapter arose "because it had a duty to supervise its members in fraternity activities and to make sure that such activities did not cross the line into hazing. The court found that there is a possibility that a jury could find in Mr. Yost's favor.

> Construing the designated evidence in favor of Yost, the nonmoving party, we find the possibility of such group activity is not precluded. The local fraternity's rules and traditions arguably may have provided the active members of the fraternity with authority over the pledges, including Yost, and the exercise of such authority may have played a

> role in the events that led to Yost's injury. For instance, Yost's injury occurred when the local fraternity brothers attempted to forcibly place him in the shower, an act which resembles a celebratory tradition of the local fraternity. Additionally, Yost's injury occurred shortly after Yost and his pledge brothers confronted some of the active members of the local fraternity in an at- tempt to toss one of these members, Yost's Pledge Father, into a nearby creek. This action was also a tradition of the local fraternity, and one in which Yost and his pledge brothers had previously participated two other times the evening of his injury. The designated evidence further suggests that one of these attempts to "creek" an active member was done at the direction of the local fraternity's pledge trainer, the active member responsible for running the local fraternity's pledge program.

Consequently, the court found a basis to allow the claim to go forward.

I laud the court's conclusion on this aspect. I disagreed with the court of appeals conclusion that the local fraternity had not assumed a duty despite knowing of the creeking tradition and the fact that the pledge packet descirbes the "Indiana Gamma Traditions: Anyone reaching his 21st birthday or becoming engaged is thrown into Sugar Creek. Anyone having a birthday other than his 21st is to be thrown in the shower." In response, I wrote:

> I must respectfully disagree with the court majority on this point. First, to say that this instance falls outside the designated tradition is to take a preposterously narrow view of the tradition. The fraternity created an environment that showed utter disregard for personal wellbeing by making it tradition to grab a person against his will and shower/creek him. Perhaps, this indicates an assumption of the risk by Mr. Yost, but to say that this instance was not within the tradition is mindboggling. Second, to find that the fraternity cannot be responsible for supervising unscheduled creekings is to inherently endorse their power to allow it in the first place. I am left wondering why a court finds itself in a position of endorsing the involuntary subjugation of a person to creeking or showering.

The Supreme Court's decision rectifies my concerns in full.

Another issue we have not previously discussed is whether Mr. Yost could seek punitive damages. The court of appeals finding no basis for liability found that he could not. The Supreme Court, though recognizing the difficulty of establishing a basis for punitive damages at trial found that these facts permitted the issue to

proceed to a jury for determination.

In sum, the Supreme Court reversed the trial court and disagreed with the court of appeals and found that the local chapter of the fraternity did not merit summary judgment. Thus, the issue of whether Mr. Yost may recover against the local fraternity may have its day in court.

Join us again next time for further discussion of developments in the law.

Sources

- *Yost v. Wabash College*, ---N.E.3d---, No. 54S01-1303-CT-161 (Ind. Feb. 13, 2014).

- *Yost v. Wabash College*, 976 N.E.2d 724 (Ind. Ct. App. 2012), *trans. granted*, 984 N.E.2d 221 (Ind. 2013).

- *Kader v. State*, 1 N.E.3d 717 (Ind. Ct. App. 2013).

- Colin E. Flora, *Fraternity & University Liability for Hazing and Other Acts*, HOOSIER LITIGATION BLOG (Oct. 5, 2012).

- Colin E. Flora, *Indiana Court Explains Meaningful Difference Between State & Federal Summary Judgment Standard*, HOOSIER LITIGATION BLOG (Dec. 13, 2013).

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