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October 5

2012



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Fraternity & University Liability for Hazing and Other Acts

As I sit down to write this week's blog post, I find myself inundated by messages from various Indiana University Alumni organizations regarding this weekend's homecoming festivities. Like any alumnus, I feel myself drawn to my memories as a student and my time spent in Bloomington. For me, my memories focus on my time spent in Forest dormitory and my friends on the 7th floor. However, I also give thought to my time spent outside of the dorm, including time spent at several of the nearby fraternities. Unlike many of my friends and thousands of other Hoosier alumni, I was not a member of the Greek system. The only Greek letters that accompany my name are that of ΦΗΣ, which is an honors society and not a social fraternity. Nevertheless, I had opportunity to acquaint myself quite extensively with the latter and frequently found myself welcomed by the fraternity community.

It is surrounded by this framework that I read the Indiana Court of Appeals decision in *Yost v. Wabash College*. The case deals with injuries suffered by a Wabash College student while a member and resident of the Wabash chapter of Phi Kappa Psi. Ultimately, the split Court of Appeals (2-1) held that neither the College nor the fraternity were liable to young Mr. Yost for his injuries. The holding does not stand for the position that a University/College and a fraternity can never

be liable for what occurs at a fraternity house. It simply found that in this particular instance, the law would not recognize liability.

I will discuss the *Yost* decision at length below. But, before I launch into the meat of the holding, I want to submit to you a question. Should universities expose themselves and taxpayers to the prospect of high liability for the actions of rowdy college boys through direct involvement with fraternities? Now, I fully recognize that Wabash College is a private institution and thus its ties to the Greek system does not open Indiana's taxpayers to liability, but this question extends beyond Crawfordsville, IN. I am not saying that the answer is an unequivocal no. However, I do believe it to be an extremely important question when you consider the risk of liability carried by universities for their continued involvement and endorsement of the Greek system. Perhaps, on balance, the benefit derived by higher education through direct affiliation with the Greek system offsets this risk. Certainly thousands of alumni would agree with that position. Still, this decision cannot be adequately addressed without considering the question that I place before you now.

Returning to the case at hand, in order to discuss the law of the case we must first discuss the specific facts that found Mr. Yost in a court of law opposing his former fraternity and college. 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.

Before the trial court, the issue was largely framed as one of hazing. As such, the focus of the decision finding in favor of defendants Wabash College and Phi Kappa Psi was that the actions did not constitute criminal hazing. Yost appealed

the decision arguing that the trial court had erred in dismissing his claims against Wabash and Phi Kappa Psi. The primary issue on appeal was whether either defendant owed a duty to Yost. Yost offered three theories for a finding of a duty: (1) premises liability; (2) assumption of duty; and (3) vicarious liability.

Premises Liability: According to the court, under Indiana law,

Landowners have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks, i.e., hazing. The duty extends only to harm from the conduct of third persons that is reasonably foreseeable to the landowner given the designated facts.

Because the plaintiff had characterized the situation as hazing at the trial court, that remained the focus for the Court of Appeals. After noting that no Indiana court had examined the liability of a university/fraternity for hazing, the Court of Appeals looked to a lengthy list of opinions from other states. In the Delaware case, *Furek v. University of Delaware*, hazing got out of hand when a fraternity member poured a lye-based liquid cleaner over the back of a pledge. The pledge was left with permanent scars from the resulting burns, was forced to withdraw from school, and forfeited his athletic scholarship. The Delaware Supreme Court found that the school and the fraternity could be liable for the hazing. In another hazing case, *Morrison v. Kappa Alpha Psi Fraternity*, the Louisiana Court of Appeals affirmed a jury verdict against the school where the frat's president beat a freshman student during a "membership interest meeting" in the president's dorm room.

After also examining decisions from other states on hazing through alcohol consumption, the *Yost* court examined Indiana decisions on premises liability against fraternities. The court focused upon two opinions in particular: *Delta Tau Delta, Beta Alpha Chapter v. Johnson* and *L.W. v. Western Golf Association*. These two decisions were decided by the Indiana Supreme Court in 1999 as companion pieces. *Delta Tau Delta*, was a case of sexual assault. The Court found that a "local fraternity chapter had a duty as landowner to take reasonable care to protect" the victim. In doing so, the Court held that the sexual assault was foreseeable because there had been two prior assaults at the house within a two-year period. Additionally, the assault took place following a party that was sponsored by the local chapter. In *Western Golf Association*, another sexual assault case, the Court found that the fraternity was not liable because there had been no prior specific instances of sexual assault at the fraternity house.

In applying these decisions to the *Yost* case, the Court of Appeals found that the fraternity and school could not be liable under premises liability. The court majority reasoned that there was no endorsement or hazing aspect to what

happened to Mr. Yost. They found that what happened to him was an isolated incident by a few individuals. However, the court did provide guidance as to what might provide a basis for such a claim in the future. The scenarios envisioned by the court are: “a college-sponsored event in which students are drinking and engaging in dangerous activities such as a slip-and-slide or a race involving bicycles or all-terrain vehicles.”

Assumption of Duty: The court found that neither the school nor the fraternity assumed a duty to protect Mr. Yost. In so holding, the court reasoned that although the school has a strict anti-hazing policy, enforcement of the policy was reactionary and thus unable to afford the basis for an assumption of duty. 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.

As to the liability of the fraternity, the court had to examine the local and the national chapters separately. With regards to the national chapter, the court found it determinative that the local chapter has only sixteen employees and runs ninety-six chapters. Further, that the national chapter gives “the local chapter original jurisdiction for matters concerning the conduct of a member” and that they were not aware of the creeking and showering traditions.

With respect to the local chapter, the court found that they had not assumed a duty even though they were well aware of both the creeking and showering traditions. The pledge packet describes the traditions: “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.” The court found that this was not such an instance. Further, the court held that the fraternity “simply cannot be expected to supervise unscheduled creekings or showerings about which they are unaware.”

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 creekings or showering.

Vicarious Liability: The court also found that neither the fraternity nor the university were liable through agency principles. To this end, based upon these specific facts, I find no objection to the court's decision. No person in this scenario was acting with actual authority upon the behalf of the fraternity or the school. I think that point is safe to say. As for apparent agency, there was no manifestation made by the frat or the school that these persons were acting on their behalf. As such, the court majority found there was no basis to support vicarious liability.

While the majority may have found that Mr. Yost could not support his case against the fraternity and Wabash, Judge Vaidik disagreed. She agreed with the majority's decision with regard to the national chapter of the fraternity but thought that there were questions of fact that should be decided by a jury with regards to the local chapter and Wabash. The primary thrust of her opinion was that there was a serious question as to whether the showering of Mr. Yost was hazing. Further, she found that Wabash had far from taken a hardline on hazing. She stated,

while Wabash did sanction the fraternities involved in some of these hazing instances, other times the college leadership did not take specific disciplinary action, they just "worked very closely with rising house leadership each year to try to prevent similar occurrences." 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.

She also believed there was a basis for liability against the local chapter of the fraternity. Among other reasons for finding as such, she noted that the manual specifically identifies creekings and showering as traditions. Thus, she found those activities to be explicitly sanctioned by the frat.

With the case now discussed, I return to my initial question: is it worth it to

maintain a system that exposes the university to liability? This result may well be seen as a great victory for defendant universities. However, I find it to be a lesson from which much may be learned. More telling than this case is the laundry list of other cases in which liability has been found. There is little question that in the world of fraternity life, reckless and wanton behavior is often far from a rarity. In a sexually charged environment fueled by rampant alcohol and recreational drug use without the slightest semblance of direct adult supervision, one must wonder how many horrible cases must come to pass before the cost of association between schools and the Greek system outweighs the benefits.

****UPDATE****

The plaintiff, Mr. Yost, sought transfer of this case to the Indiana Supreme Court. On March 7, 2013, the Court granted transfer, thus vacating the decision of the Court of Appeals.

Sources

- *Yost v. Wabash College*, 976 N.E.2d 724 (Ind. Ct. App. 2012), *trans. granted* (Ind. March 7, 2013).
- *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991).
- *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105 (La. Ct. App. 1999), *writ denied*.
- *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968 (Ind. 1999).
- *L.W. v. Western Golf Ass'n*, 712 N.E.2d 983 (Ind. 1999).

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