Are Colleges, Universities on the Hook When Hazing Crosses the Line?

In *Humphries vs. Pa State Univ.*, 2021 U.S. Dist. LEXIS 182858, 2021 WL 4355352 (M.D. Pa. September 24, 2021) (Brann, J, negligence claims against Penn State for the hazing and sexual abuse of a college athlete who ultimately left the school were dismissed. The Court found there was no negligence *per se*, negligence, duty or contractual right. Even though there were rather dramatic and lengthy allegations concerning how the student was treated and claims that the University turning a blind eye, the Court found there was no abuse, no affirmative duty, and no harassment because of sex. The action was dismissed because plaintiffs had been permitted to amend previously.

Notwithstanding the 105-page description, the Court found that the allegations were not sufficient to impose a duty. Humphries alleged that specific promises were made by Penn State to keep him safe and take care of him. Nevertheless, four students grossly sexually abused the athlete, which included physical touching of genitalia. The Court did not, in examining the Pennsylvania case law, find that any duty existed to protect the student athlete under the facts alleged. Penn State was said not to have accepted the duty of protection, notwithstanding its promises during recruitment.

The Court held that Restatement (Second) of Torts §323 (1965), did not provide authority for the proposition that there was a duty to protect students from violation of university policies, specifically a duty to control football players to conform their behavior to the Student Code of Conduct and Administrative Policies. The Court decided that Humphries' claim failed because "the policies that Humphries invokes—read generously—only provide a general promise of protection, " *Humphries, supra*, 2021 U.S. Dist. LEXIS 182858, at *23, as opposed to a specific undertaking required by Pennsylvania's restrictive reading of the Restatement. *Id.* at *22.

The Court also considered the argument that a special relationship had been created between the university and its athletes that provides a basis for his suit. After examining a host of Pennsylvania cases in similar situations, including *Feleccia vs. Lackawanna College*, 2017 Pa. Super. 44, 156 A.3d 1200, 1215 (Pa. Super. 2017), and *Althaus ex rel. Althaus vs. Cohen*, 756 A.2d 1166 (2000), the Court noted that the protection sought by Humphries "is of a different sort and different scope. It's one thing to require that schools provide adequate medical services to athletes during practices or competitions; it's quite another to require that schools guarantee those athletes' safety once they have left the field. The former was targeted; the latter turns the school and coaches into all-purpose insurers of a particular set of students." *Humphries, supra*, 2021 U.S. Dist. LEXIS 182858, at * 35-*36, citing *Bradshaw vs. Rawlings*, 612 F.2d 135, 138 (3rd Cir. 1979). Judge Brann concluded that the case law did not disturb his finding that Pennsylvania, simply stated, does not in general impose a special relationship between colleges and student athletes that would impose a duty of care according to the Court. To do so would expand the law. *Humphries, supra*, at *36.

After disposing of the foregoing case law and the Restatement, the court examined the allegations of affirmative conduct of the university and its representatives, the promises made to the Plaintiff, Humphries' scholarship and the parties' mutual dependence as allegedly creating a special relationship. The District Court simply

found that the affirmative duty asserted in *Humphries* "differs from the duty creating conduct identified in *Feleccia* and other cases in the Pennsylvania Supreme Court's affirmative duty canon." *Id*. at *41. The facts alleged did not rise to the level of affirmative acts which both created a risk and induced reliance. *Id*. at *37-41.

Working hard to make a distinction, the Court further rejected the concept that a duty existed with respect to the fact that Penn State was a possessor of land and there was therefore a special relationship to users such as Humphries, as well as a negligence *per se* claim under Pennsylvania's Anti-hazing Statute, 18 Pa. C.S. §2805, pursuant to *Schemberg vs. Smicherko*, 85 A.3d 1071 (Pa. Super. 2014). The Court found it unnecessary to delve into whether Penn State promoted or facilitated hazing, because Humphries revised pleadings failed to allege an underlying hazing violation. The offenses committed against Mr. Humphries, according to the Court, were not part of an initiation process, although reading the opinion it certainly sounded like what Mr. Humphries four teammates did to him was a kind of crude, unacceptable, repulsive initiation.

The remainder of the opinion addressed the emotional distress claim and relied upon *Toney vs. Chester Cty. Hosp.*, 36 A.3d 83 (Pa. 2011). According to the Court, no *prima facie* claim of negligence was established and therefore *Toney* was inapplicable. Supporting its reasoning, the Court stated: "Given the narrow scope of this not-quite recognized NIED liability ground, it should come as no surprise that courts mostly in this state have found that 'a relationship between a college and its students does not hold the potential of deep emotional harm.' That Humphries played a sport for his college does not alter the calculous. Whether through a benching or a tragic loss, heartache is certainly to accompany college sports…." *Humphries, supra*, at *57 (footnote omitted).

It would appear that the conduct suffered by Mr. Humphries would be precisely the sort of NIED claim that the courts should entertain. Nevertheless, the federal court in this instance found a lack of predicate negligence, weak non-precedential authority and a lack of a special relationship. Also found lacking was a state claim under Title IX.

The *Humphries* case should also be compared with a hazing case in the context of an "ordinary student-university relationship," *Jean vs. Bucknell Univ*., 2021 U.S. Dist. LEXIS 170727, 2021 WL 4145055 (M.D. Pa. September 9, 2021) (Brann, J.). Defendant Bucknell University moved to dismiss claims brought against it by one of its students, John Jean, relating to alleged hazing Jean suffered while seeking to join a fraternity on Bucknell's campus. In his original Complaint, Jean named Bucknell as a defendant in three causes of action: (1) negligence; (2) "hazing"; and (3) negligence per se. The Court dismissed these claims, holding that the allegations failed to support the claims against Bucknell; however, the Court did so without prejudice, granting Jean leave to amend. Jean obliged and filed his Amended Complaint, which restated the three causes of action against Bucknell but also included additional allegations concerning other instances of hazing on Bucknell's campus, the culture of underage drinking at Bucknell, and the school's failure to publish a fraternity recruitment handbook. Again, Bucknell argued that the allegations failed to support the claims against it. Again, the Court agreed. For the reasons discussed below, Bucknell's motion to dismiss was GRANTED.

To date, no court has specifically addressed the question of how to define "facilitate" for purposes of Section 2804 of the Pennsylvania anti-hazing statute. Federal and Pennsylvania state courts have, in certain contexts, endorsed the broad, plain dictionary definition, "to make easier," that Jean advocated for. However, in the view of the Court, Bucknell was correct in asserting that Section 2804 required "the alleged perpetrator to actively contribute to" rather than merely fail to take action to prohibit the hazing. *Jean, supra,* 2021 U.S. Dist. LEXIS 170727, at *18. In Pennsylvania's criminal statutes, the precise terminology included in Section 2804—that is, "promotes or facilitates"—generally appears in the context of criminal accomplice or conspirator liability, both of which require some level of affirmative action by the defendant. This interpretation is consistent with the United States Supreme Court's holding in *Abuelhawa v. United States*, 556 U.S. 816 (2009), in which the Supreme Court explicitly declined to apply the plain meaning of "facilitate" (*i.e.,* to make easier or less difficult) in the context of Section 843(b) of the Controlled Substance Act.

As noted, the facts alleged in the Amended Complaint did not establish that Bucknell was aware or should have been aware that hazing would occur at the September 10, 2020 Iota Chapter initiation event. At most, the alleged prior instances of hazing by other organizations on Bucknell's campus provide general notice that hazing could occur at some student organization event. That is insufficient. Absent any indication that Bucknell at the very least should have been aware that hazing would occur at this initiation event—thus, that this particular incident of hazing would have been foreseeable to a reasonable institution in Bucknell's position—the Court could not conclude that Bucknell consciously disregarded a substantial and unjustifiable risk that Jean would be subjected to hazing.

In sum:

Humphries v. Pa. State Univ., 2021 U.S. Dist. LEXIS 182858 (M.D. Pa. September 24, 2021) (Brann, J.).

- Student athlete at Penn State hazed and harassed by co-athletes on his team.
- The court, Chief Judge Matthew Brann, found no negligence claim possible; no duty on the part of the university, in spite of its knowledge; no affirmative conduct; no special relationship; no possessor of land obligation; no negligence *per se* to afford protection; no claim under the Restatement 323; no negligent infliction of emotional distress.
- The court found *Toney v. Chester County Hospital* recognizing a new NIED claim to be inapplicable.
- No sexual harassment; no retaliation under Title IX.

Jean v. Bucknell Univ., 2021 U.S. Dist. LEXIS 170727 (M.D. Pa. September 9, 2021) (Brann, J.).

- Hazing complaint against Bucknell.
- Court did not find that a negligence action was established against Bucknell just because it generally knew of drinking and hazing incidents on the campus.

- Section 2804 of Pennsylvania's anti-hazing statute imposes liability on an organization that intentionally, knowingly or recklessly promotes or facilitates hazing.
- There was no such evidence against Bucknell.
- No court has specifically addressed the question of how to define "facilitate" for purposes of the anti-hazing statute.
- Case dismissed.

It would not be surprising to eventually see appellate review of these decisions, particularly the *Humphries* decision, considering the status of sports at big league universities and the extent to which they affect students academically, emotionally and physically.

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