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Lawsuit Filed by Gruver Family

Max Gruver died on property leased from LSU in the Phi Delta Theta fraternity house when some members of the Chapter violated the rules of the fraternity, the regulations of the University, and the laws of the State of Louisiana.

It is not surprising that in addition to naming the wrongdoing chapter members, the recently filed wrongful death lawsuit brought by Max's parents on behalf of his estate also names the University, National Fraternity, Chapter and House Corporation. Those parties are typically named in such litigation, though often some of those named defendants are not found legally liable. What makes *Gruver, et al. v. State of Louisiana*, et al.[1] unique is that in addition to the negligence, wrongful death and premises liability claims brought under Louisiana law, a separate count is being brought against the Board of Supervisors of Louisiana State University (LSU). In Count I of the litigation, the plaintiff alleges that LSU violated Title IX, 20 U.S.C. §1681. Title IX prohibits discrimination in educational opportunity based upon sex. Specifically, Title IX states:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial Assistance...."

In the Complaint, the plaintiff alleges that while LSU had knowledge of a long history of hazing and alcohol abuse, it did not adequately respond. The plaintiff claims that "as a matter of policy and practice, [LSU] remained deliberately indifferent to the severe and pervasive risks of serious injury and death faced by male students and treated hazing of males significantly less seriously than hazing of females...." LSU is accused of failing to take stern action against male hazing "because of long-held and outdated gender stereotypes about young men," and that LSU had "a policy and practice of treating the hazing of male students significantly less seriously than the hazing of female students, minimizing the hazing of males as 'boys being boys' engaged in masculine rites of passage."

While Title IX claims are typically, and appropriately, made by women who are survivors of sexual assaults, and occasionally now are made by males accused of sexual assault who argue that the university is prejudiced in favor of women bringing such complaints, this appears to be the first use of Title IX claiming sex discrimination in how a university enforces its rules against hazing and alcohol abuse. Whether or not such a claim can survive a motion to dismiss or a motion for summary judgment by the university remains to be seen. Given the very recent filing of the Complaint, the Title IX issue, as well as all of the other issues involved in the complaint, have yet to be responded to by the defendants.

Two High Courts Address "special duty" to Students

The Supreme Courts of two states earlier this year each addressed the issue of a college's "special duty" to protect its students.

The Regents of the University of California, et. al. vs. the Superior Court of Los Angeles County, et. al. 413 P3rd 656 (Cal. 2018) involved two UCLA students. One had a history of mental health challenges, hearing voices, threatening other students and ultimately attacking and stabbing a fellow student in a University chemistry laboratory causing serious life-threatening injuries. The injured student sued UCLA claiming that the University "owed her a duty of care because colleges have a special relationship with students in the classroom, based on their supervisory duties and the student's status as a business invitee".

The second case, *Dzung Duy Nguyen vs. Massachusetts Institute of Technology*, 479 MASS 436 (Supreme Judicial Court of Massachusetts, 2018), involved the suicide of a student in a Ph.D. program who suffered from a series of mental and other medical issues. He ultimately jumped to his death from a University building. This case also involved the question of

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whether or not a university owed a special duty to a student which would require it to take reasonable measures to prevent his suicide.

Both Courts ended up concluding that under certain specified, limited circumstances, universities have a special relationship with their students and were obligated to take steps to prevent injuries to their students or, in the case of threatened suicides, to prevent self-harm.

The California Court specifically recognized that colleges do have a special relationship with their students, not "with the world at large, but only with their enrolled students". In recognizing that special relationship, the Court clearly pointed out that liability under that relationship is limited. "It extends to activities that are tied to the school's curriculum but not to student behavior over which the university has no significant degree of control."

The violent knife attack occurred in the chemistry laboratory and the Court points out that "education is at the core of a college's mission and the classroom is the quintessential setting for curricular activities." The California Supreme Court set out several factors that must be considered in order to determine whether or not liability attaches to the University even in situations where the special relationship exists. The factors enumerated included the foreseeability of harm; the degree of certainty that Plaintiff was injured; the closeness of connection between Defendant's conduct and the injury suffered; the moral blame attached to the Defendant's conduct; a policy of preventing future harm; the burden of preventing the harm; and "the availability, cost and prevalence of insurance for the risk involved".

The Court was clear in saying that "Colleges are not the ultimate insurers of all student safety. We simply hold that they have a duty to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting. Reasonable care will vary under the circumstances of each case."

In the MIT case, the Court upheld the Summary Judgment in favor of the University but did so only after determining that:

> "A University has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances. Where a university has actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm."

In essence, the Court made it clear that it viewed the University's obligation as a limited duty which "is created only by actual knowledge of a student's suicide attempt. . . or of a student's stated plans or intentions to commit suicide". The Court further clarified the duty "to initiating the university's suicide prevention protocol and if the school has no such protocol, arranging for clinical care by trained medical professionals or, if such care is refused, alerting the student's emergency contact." The Court also indicated that the duty is "time bound. Medical professionals may, for example, conclude that the student is no longer a suicide risk and no further care or counseling is required".

Carefully reviewing all of the facts, the Court found that there was no record of the student having attempted suicide while at MIT, and on repeated occasions he denied University assistance. The Court also discussed at some length what the University did do to provide assistance to the student. As a result of all of the facts, the Court found that MIT and its University Defendants had not breached the special duty to the student and upheld the summary judgment in favor of the University defendants.

How likely that the same legal theories could be applied to a fraternity or sorority chapter is not clear. It is important to note that in both cases, the Court's significantly limited the duty that a college or university has to its students. In California, clearly saying that special duty exists only when a student is in curricular activities. In Massachusetts, the special duty to act with regard to suicide threats existed only when there was certain knowledge of a recent history of attempts or a current threat of a suicide or other specific circumstances applied.

While it is far from certain that the special duties found to be applied to colleges and universities with regard to their students would extend to the obligations of fraternities or sororities and their chapters, if there is knowledge that a member may be a threat to harm themselves, it is far better to act in a reasonable way than to ignore that threat. A member who shares their plans or thought about suicide should be caringly advised to seek professional assistance. They should be given information about the university counseling office. If a member refuses such advice and still appears to be a threat to self-harm, chapter officials or advisors should themselves consult with university counseling officials for assistance. As the Court in the Massachusetts case provided, alerting the member's emergency contact (usually a parent) may also be a valuable step.

Documenting that such reasonable and appropriate steps were taken would, even if a tragedy did occur and a court would consider applying the special relationship standards discussed in these cases, likely produce the same result as the Massachusetts case where a Motion for Summary Judgment in favor of MIT and its officials was granted and upheld.

Guilty Pleas at Penn State

Fifteen months after Timothy Piazza died in a hazing incident fueled by alcohol and the failure to get him help for more than 12 hours, the first of two dozen defendants pled guilty and was sentenced on July 31, 2018.

Ryan Burke was the Rush Chair for the Beta Theta Phi Chapter at Penn State. He is the first of the defendants to plead guilty. According to an *Associated Press* story,[1] Burke pled guilty to four counts of hazing and five counts of alcohol violations. He had originally faced far more serious charges, including involuntary manslaughter and aggravated assault. Those counts had been dismissed.

The *New York Times* reports that Burke was sentenced to three months of house arrest and "In addition to the house arrest, Mr. Burke was sentenced to 27 months of probation and ordered to pay fines, costs and restitution."[2]

The *Times* article reports that Tom Kline, a lawyer for the parents of Timothy Piazza, said that "25 other defendants had entered not-guilty fees and would face trial in February."

The *Associated Press* story describes a sentencing memo that had been presented to the court by the prosecutor as saying that Burke "appeared unconcerned," even after Piazza had fallen down the basement stairs and had to be carried to a first floor sofa. The sentencing memo is quoted as saying that [Burke] "is seen playfully hoisting a girl over his shoulders, jumping on the sofa next to Piazza, and then rolling over and on top of Piazza as he is getting up before leaving the room. He leaves Piazza to be dealt with by others."

- Timothy M. Burke

1 "First Penn State Student Sentenced in Death of Fraternity Pledge," *Associated Press* story posted July 31, 2018.

Indiana District Court Denies MSJ in Sexual Assault Case

In the June 2018 issue of *Fraternal Law* we reported on the status of *Jane Doe No. 62 v. Delta Tau Delta, Theta Alpha Chapter*[1] in which the federal court judge had asked the Supreme Court of Indiana to provide guidance on four certified questions relating to the obligations under Indiana law of a fraternity and fraternity chapter to prevent sexual assaults by a member. Pending the responses to those questions, the federal court, while granting part of the fraternity's Motion for Summary Judgment, held the remaining negligence claims against the chapter in abeyance pending the guidance from the Indiana Supreme Court. In the end, the Supreme Court declined to provide any such guidance.[2]

On July 11th, United States District Court Chief Judge Jane Magnus-Stenson issued a decision denying the remainder of the Fraternity Chapter's Motion for Summary Judgment. In doing so, the Court reviewed the legal standards for a motion for summary judgment, noting that the Court must view the record "in the light most favorable to the non-moving party" and cannot weigh the evidence or make credibility determinations. In short, if relevant facts critical to deciding a case are in dispute, any doubt is resolved against the party making the motion. That was the high burden that the Chapter faced. In this case, one of the critical issues was whether or not the Chapter had notice and knowledge of a prior accusation of sexual assault by the member who was criminally charged with the sexual assault of the plaintiff, and ultimately pled guilty to a charge of battery.

Judge Magnus-Stenson recognized that Indiana law had long provided that the possessor of a property owed an invitee reasonable care for the invitee's protection. The Judge also recognized that as the law had developed, there was a difference between the duty regarding conditions on the land and the duty as to activities on the property. Much of the distinction was based on foreseeability. That is, did the defendant have knowledge of facts which reasonably should have led them to recognize the likelihood of the injury.

For example, if the house has a known broken step, it is foreseeable that someone could be hurt walking down the stairs. This is a condition on the land. On the other hand, serving hard alcohol to under-aged new members is an example of an activity on the property where the potential for harm is likely to be viewed as foreseeable.

In the critical paragraph of the decision, the Judge noted:

> "In this instance, considering the 'broad type of plaintiff' and the 'broad type of harm,' as well as defendant's knowledge, the Court concludes that the duty implicated here can be described as follows: the broad type of plaintiff is an invitee to a social fraternity event, and the broad type of harm is sexual assault by a member previously alleged to have committed sexual assault, where the fraternity knew or should have known of the prior allegations. While the Court concludes that a duty arises from the facts viewed in the lights

most favorable to Ms. Doe, the Court acknowledges that there is a genuine dispute of material fact as to whether any prior allegations of sexual assault were made, and if so, whether [the Chapter] knew or should have known about them. [The Chapter] argues that even if it did have knowledge of the prior sexual assault allegations, those allegations were either too attenuated or too stale to constitute knowledge relevant to this particular incident, but this Court declines to determine as a matter of law that information received 18 months prior to an incident is *per se* insufficient to constitute relevant knowledge, particularly when the information is an allegation of sexual assault."

The Court went on to summarize the elements that the plaintiff would be required to prove should the case go to trial, stating:

1) [The Chapter] was the occupant of the property;

2) Ms. Doe was an invitee on the property occupied by [the Chapter];

3) Ms. Doe was injured as a result of a sexual assault by a [Chapter] member on the property; and

4) [The Chapter]

   (a) knew or should have known that the allegations of a prior sexual assault had been made against the member; and

   (b) failed to use reasonable care to protect the invitee against the danger posed by the member."

Critically, the Court's conclusion succinctly summarized the decision this way:

> "A social fraternity owes a duty of care to its invitees to protect them from sexual assault by a fraternity member previously alleged to have committed sexual assault, where the fraternity knew or should have known of the prior allegations."

In the final sentence of the decision, the district court judge gives the following assignment to the magistrate judge.[3]

> "The Court requests that the magistrate judge confer with the parties at her earliest convenience to discuss a possible agreed resolution of this matter."

- Timothy M. Burke

1 *Jane Doe No. 62 v. Delta Tau Delta, Theta Alpha Chapter*, Case No. 1:16-CV-01480-JMS-DMI (D. Ind. 2018).

2 Indiana University, the National Fraternity and the House Corpo-

Interesting Settlement from Utah State

Settlements of lawsuits are not unusual. They are often frequently preferred to the uncertainty and huge expense of protracted litigation. Settlements, when opposing parties agree, can include provisions requiring parties to do things that a court decision could not. For instance, the parties could agree to implement certain changes in practices instead of simply recovering monetary damages. And it is not unusual for one party to settle while claims remain pending against other parties.

But in a somewhat unusual move, Utah State University (USU) recently settled a sexual assault case against the University, Sigma Chi, the fraternity chapter, it's alumni foundation, the chapter house corporation, numerous individuals named as John Does, and the assailant, Jason Relopez. USU agreed to pay the plaintiff, Victoria Hewlett, and her attorney, $250,000.00,[1] but the settlement didn't end with the monetary payment. USU agreed to numerous other steps, including a joint op-ed statement and a series of changes in how USU interacts with Greek organizations. Under the settlement agreement, all Greek organizations will be required to be recognized and approved as official university student organizations. Each chapter will be required to submit a report once a semester, including the summer semester, identifying "all known allegations or reports of misconduct, including sexual or other misconduct; all known allegations or reports of alcohol or controlled substances; actions taken by the chapter to internally address report of misconduct and infractions; descriptions of actions taken by the chapter to prevent sexual harassment, underage drinking and alcohol and substance abuse; and the chapter's GPA."

The settlement also requires that each chapter must agree to allow "periodic, random, unannounced inspection by representatives of USU" of their houses.

USU also agrees to hire new full-time Greek Life Coordinator; provide trauma informed training for its employees; conduct an annual campus climate survey; require all students to take primary prevention training on sexual harassment; and provide "annual training and sexual harassment for all high-risk groups, including, but

not limited to, all members of fraternities and sororities, and student members and staff of athletic programs."

USU is also required to hire a consultant to develop training in sexual harassment prevention and response. Surprisingly, Hewlett's attorney will pay $10,000.00 towards the consultant's fees.

While some of the terms of the settlement may certainly be helpful, other terms are concerning, particularly because they appear to have been entered into without appropriate consultation with those who will be impacted by the settlement. At least two of the provisions appear to violate the constitutional rights of USU students who belong to Greek organizations. Specifically, contrary to USU's new policy, fraternity chapters at a state university whose members are otherwise in compliance with all university regulations and laws cannot be required to be recognized by the university without violating the Freedom of Association rights of those students. Could the university require that all religious organizations which their students belong to must be recognized by the university? Of course not. It would be a violation of the student's First Amendment Freedom of Speech and Freedom of Association rights, in addition to being a violation of their Freedom of Religion rights.

Similarly, the requirement that privately-owned chapter houses are subject to "periodic, random, unannounced inspections by a representative of USU," appears to be a clear violation of the student's Fourth Amendment Rights "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[2] The provision of the settlement that such inspections "shall occur at least twice during each semester, including summer semester, during times when formal or informal social gatherings are expected, does not eliminate the Constitutional violations" does not comply with the Fourth Amendment.

No More Women's Groups at Harvard

It appears that Harvard University has achieved part of its goal in eliminating single-sex organizations composed of Harvard students. Ironically, an effort which began as a crusade against sexual assaults alleged at men's finals clubs has resulted in the elimination of all single-sex WOMEN'S organizations.

The *Harvard Crimson* reported on August 19, 2018 that "the last sorority just disappeared from Harvard's campus. The Harvard Chapter of Alpha Phi said last week it was disaffiliating from its national organization and forming a co-ed group called 'The Ivy'."[1]

Days later, the *Harvard Crimson* reported that the last three women's only finals clubs had ceased being women's only organizations.

Harvard achieved this grand result by prohibiting members of single-gender organizations from holding campus leadership positions, such as in student government, serving as captains of varsity athletic teams, or receiving required college endorsements for major national and international fellowships.

Numerous all male groups continue to offer membership to Havard students.

Just what grand benefit, one of America's most prestigious universities thinks it has achieved as a result of this effort is not at all clear.

- Timothy M. Burke

House Democrats Propose New Legislation

Legislation which would reauthorize the Higher Education Act remains pending in Congress. In the January 2018 issue of *Fraternal Law*, we reported on H.R. 4508 (the Prosper Act).[1] Now, House Democrats have proposed a different version of a bill to reauthorize the Higher Education Act. This one is known as the Aim Higher Act.

As in the Prosper Act, the Aim Higher Act addresses the Clery Act, requiring the disclosure of campus crime statistics. The Aim Higher Act would add hazing and harassment as reportable offenses to the Clery crime reporting obligations. A new subsection would also be added to Clery requiring the Secretary of Education, in consultation with the Attorney General and experts in a variety of matters relating to sexual assault, to develop a standardized survey tool which institutions would be required to administer every two years. Furthermore, each institution would be required to publish the survey results on the institution's website.

As with the Prosper Act, the Aim Higher Act addresses numerous other issues contained in the Higher Education Act, particularly related to educational funding issues. It remains to be seen when Congress will move forward on either measure and the closer we get to November's mid-term elections, the more probable it becomes that reauthorization of the Higher Education Act is not likely to occur until the new Congress is in place in 2019.

- Timothy M. Burke

1 *Fraternal Law*, January 2018, "House Considers Higher Education Reauthorization."

Update on USC Deferred Recruitment Case

The June 2018 issue of *Fraternal Law* reported that five of the Greek Chapters at the University of Southern California filed suit in state court challenging the University's imposition of deferred recruitment. The lawsuit relied on California's unique Leonard Law, which prohibits a private university from making or enforcing "a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech."

On August 23rd, Superior Court Judge Patricia Nieto turned down that effort denying a preliminary injunction. Importantly, the Court found that the plaintiffs did have standing to bring their claims, a critical first step. However, the Court states in its "[Tentative] Ruling" that plaintiffs "simply have not shown that the policy was created as a disciplinary sanction against any sorority or fraternity for failure to abide by university policy or against any individual student for violating the standard and policies established for fraternities and sororities." What the court ignores is not that the policy was adopted as discipline, but if students and their organizations choose to recruit students in violation of the deferred recruitment policy, they are subject to discipline. It is that violation of the Leonard Law which the lawsuit sought a court order to prohibit.[1] We will continue to provide updates as this case progresses.

- Timothy M. Burke

1 *Omicron Chapter of Kappa Alpha Theta Sorority, et al. v. University of Southern California, et al.*, Case No. BC711155, Sup. Ct. of

Michigan Fraternities Sever Ties With University

On Monday July 16, 2018 the City Council of Ann Arbor, Michigan passed an ordinance amending elements of the Ann Arbor zoning code that specifically impact fraternity and sorority chapter houses. Of particular concern, the changes tie zoning compliance to the resident fraternity or sorority maintaining an affiliation with the University of Michigan (or another local institution of higher education) (collectively, "University"). In other words, a fraternity or sorority use is unlawful unless the resident chapter is recognized by the University. Prior to this amendment, University recognition had no bearing on the lawfulness of a chapter house use.

This is not the first time we have seen this kind of ordinance. For instance, the State College zoning ordinance provides that a lawful fraternity may house only "members of a [Penn State] University recognized fraternity or sorority". Likewise, Bloomington, Indiana requires that "Indiana University has sanctioned or recognized the students living in the building as being members of a fraternity or sorority through whatever procedures Indiana University uses to render such a sanction or recognition". In fact, these ordinances are becoming widespread.

Some of these ordinances are currently the subject of litigation. The highest court to consider such an ordinance is the New Hampshire Supreme Court. *Dartmouth Corp. of Alpha Delta v. Town of Hanover*, 169 N.H. 743, 744 (2017). The *Dartmouth Corp.* court considered a Hanover, New Hampshire zoning ordinance that required that a lawful fraternity operate "in conjunction with" Dartmouth College. Hanover adopted the "in conjunction with" requirement in 1976.

In 2015, Dartmouth College de-recognized the Alpha Delta fraternity for risk management violations involving branding pledges. In turn, the Town of Hanover revoked the zoning certificate for the Alpha Delta chapter house.

The Alpha Delta house corporation established that it had been using the property as a fraternity house since 1920. Accordingly, the house corporation asserted that it had established a non-conforming fraternity house use irrespective of the 1976 "in conjunction with" ordinance.

Instead of accepting the overall fraternity house use as the determinative finding, the *Dartmouth Corp.* court framed the inquiry by analyzing the individual components of the fraternity house use. The Court concluded that the Alpha Delta chapter house use was, in fact, non-conforming as to nearly all of the components of a lawful use. However, because the Alpha Delta chapter house operated "in conjunction with" the College in 1976, then the fraternity house use was not non-conforming as to the "in conjunction with: requirement. Accordingly, when Dartmouth College de-recognized Alpha Delta in 2015, the Town was correct to revoke the chapter house zoning permit.

Michigan Fraternities Sever Ties With University

The Court explained its reasoning as follows:

Because a fraternity was lawfully operating a student residence "in conjunction with" [Dartmouth College] in 1976, it was not until the college derecognized the fraternity in 2015 that the fraternity's use of the property violated the town's zoning requirement that a the fraternity's use of the property violated the town's zoning requirement that a student residence operate in conjunction with [Dartmouth College], and therefore the fraternity, which argued that it had a nonconforming use, had not shown that it was grandfathered from the "in conjunction with" requirement.

Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 744 (2017)

The Ann Arbor recognition ordinance is not materially different than the Hanover "in conjunction with" ordinance. Under either ordinance, the Dartmouth Corp. case stands for the idea that if a fraternity is recognized by the applicable institution as of the effective date of the ordinance, then such a fraternity may not successfully assert later that it is a nonconforming use.

In Ann Arbor, there is a 10 day period between the passage of a zoning ordinance and its effective date. Within that 10 day period, and with due consideration of the *Dartmouth Corp.* case as well as any individualized circumstances, more than a dozen fraternities elected to disaffiliate from the University prior to the effective date of the Ann Arbor amendment. By disaffiliating from the University before the effective date of the new Ann Arbor ordinance, those fraternities protected their non-conforming chapter use in the event they are later de-recognized by the University.

These types of zoning ordinances are, and will remain, a significant issue for fraternities and sororities for the foreseeable future. Disaffiliation before such an ordinance takes effect is one of several available strategies to combat these ordinances. We will keep our readers updated as events unfold both in Ann Arbor and elsewhere.

Sean P. Callan

The Goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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