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UNITED STATES COURT OF APPEALS RULES IN FAVOR OF LAMBDA CHI ALPHA, HOUSE CORPORATION AND ADVISOR

A federal appellate court has recognized that a national fraternity (Lambda Chi Alpha), a house corporation, an alumni advisor and a chapter do not have any tort liability for the actions of a chapter member who becomes intoxicated on his own alcohol. This case involved the typical relationship between a national fraternity and a chapter located many miles away; and for a local house corporation which served as a landlord that owned the chapter house and rented bedrooms to the members, and for an alumni advisor who was available for consultation and advice to the chapter members, but who had no supervision authority; and finally between other chapter members and the tortfeasor, who supplied his own alcohol and who received no beverages from the Chapter.

Summary judgment was granted in the U. S. District Court in Kentucky under Kentucky law to LXA National Fraternity, the house corporation, the chapter's alumni advisor and the chapter members and it was upheld by the 6th Circuit Court of Appeals in *Shaheen v. Yonts*, Case No. 09-6033, opinion of District Judge Wilhuit, sitting by designation, filed August 31, 2010.

The underlying facts reflect purely individual conduct by Mr. Yonts, an adult student, who was under 21 years old. He was a chapter member who drank at an apartment and at a local bar with friends prior to attending a chapter party, and then drank his own alcohol while there, before leaving in his car and running over and killing a pedestrian at 2:00 am about ¾ of a mile from the chapter house. The chapter did not furnish any alcohol to the member and the national fraternity, the house corporation and the alumni advisor were not involved in the social event and did not know it was being held by the chapter and did not attend it. The allegations of vicarious liability and direct liability against each Defendant were dismissed because there were no factual issues that created any duty to supervise Mr. Yonts or the function for purpose of direct negligence or to control Mr. Yonts or the chapter so as to warrant imposition of vicarious liability.

This case can be cited for the propositions that:

- a) National Fraternity that has the right to revoke a charter and to expel members and requires chapters to submit budgets for approval and provides rules and policies for chapters' adherence had predominantly passive participation in the chapter's activities and therefore NO factual issue of "control" arose, as a matter of law, so as to create a jury issue on vicarious liability of the national fraternity for local negligence. It was noted that the local chapters were required to enact their own by-laws. This case held that there was NO basis for the imposition of VICARIOUS LIABILITY on the NATIONAL FRATERNITY for the chapter or the member's alleged torts under those facts.
- b) A National Fraternity that does not charge one of its employees with the responsibility of monitoring underage drinking at the local chapters did NOT voluntarily assume a duty to do so by virtue of a general policy statement regarding social welfare and alcohol and where it had no specific rules or policies dedicated to alcohol consumption, but expected the chapters to abide by federal, state and local law, without exercising any oversight in regard to those laws. This case held that there was NO basis for the imposition of a "VOLUNTARILY ASSUMED DUTY" on a NATIONAL FRATERNITY to supervise and monitor underage drinking at the local chapters under those facts.
- c) Without the National's physical presence at a local chapter, the Court stated that the "imposition of a duty to supervise and or control the actions of a local chapter and its members is illogical and untenable." In so holding, the Court placed emphasis on the National's "lack of direct participation in the event" and that the National Fraternity's office was located many miles and in another state from the Chapter and "did not have the ability to monitor the day-to-day activities of its local chapters and only had the power to discipline after the fact," quoting from cases that used such reasoning. This case held that there was NO basis to charge a NATIONAL FRATERNITY with a DUTY TO SUPERVISE or CONTROL the actions of a local chapter or a member under those facts.
- d) If none of the individual members gave alcohol to the intoxicated participant, then there was no basis for holding any of the individual members of the chapter liable, stating that the Court's analysis of

that issue was “the same as the analysis pertaining to the claims against LXA.” This case held that these facts did NOT give rise to ANY DUTY on behalf of the CHAPTER MEMBERS to monitor or supervise another’s drinking and that there was NO basis to impose VICARIOUS LIABILITY. (This holding does not leap out of the opinion but is implicit by the Court’s reference to its analysis of the National’s liability in reaching its conclusion that the chapter members were not liable. The Court did not address the fact that the other chapter members were physically present, so the conclusion appears to be that the Court based its decision on no vicarious liability on the lack of an employment or master-servant relationship between the chapter members and the tort feisor and the lack of any special relationship between the chapter members and the adult tort feisor whereby such a duty could be imposed to protect third parties from the tort feisor.)

- e) A house corporation that owns and leases rooms at the premises where the party occurred to chapter members, but “had no presence at the subject party” and had “no requirement for it to be present at social functions” and “did not provide or otherwise furnish alcohol for it” and was not “even aware of the party” did NOT present enough evidence of a DUTY on the house corporation to control the day-to-day operations of the chapter. The Court went on to note that the power to evict the chapter did not put anything “in the record which suggests that the LXA House Corp. had the ability or the opportunity to control the actions of the fraternity members with regard to any aspect of fraternity life.” This case held that a HOUSE CORPORATION did NOT have or assume any DUTY to SUPERVISE or CONTROL and did NOT have VICARIOUS LIABILITY for the chapter’s conduct under those facts.
- f) The chapter advisor who did not have any disciplinary authority and who had not been given responsibility for the chapter by the National and who served as the “chief judicial officer for the chapter” who sat as “judge” at the trials of local members facing formal charges and who gave advice to the chapter was only in an “advisory position, he did not occupy a supervisory position”, which was “a distinction which is dispositive in this case.” The court also noted that the advisor was not present at the party, did not furnish alcohol at it and there was “no evidence that he was even aware of this specific gathering.” This case held that the CHAPTER ADVISOR who only advised and who did NOT ASSUME or was NOT GIVEN A DUTY to SUPERVISE was not liable for the chapter’s conduct under those facts.

This opinion agrees that a duty should not be imposed in the typical fraternity situation where there is no practical or realistic opportunity to alter the outcome merely because these Defendants had a fraternal relationship with the tort feisor. The Court analyzes the relationship of each Defendant with the Chapter and/or the tort feisor. This case directly supports the risk management principles of a National Fraternity which does not and cannot, as a practical matter, get involved in the day-to-day oversight or monitoring of any chapter or members, as long as the National expects its chapters to obey the law and not run afoul of sensible rules, regulations or standards and enforces known violations and does not actively participate in local activities, but still conducts educational seminars and disseminates educational materials and retains the right to revoke a charter for violations discovered “after the fact.” The Court characterized such a relationship as “passive” and insufficient to create a right of control or a duty to oversee local conduct.

This case follows Kentucky’s favorable precedent in *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 SW3d 840 (Ky 2005), which declined to impose “an affirmative duty or supervision and control” on a national fraternal organization whose only evidence of control was the ability to revoke a local charter. *Carneyhan* recognized, as does *Shahen*, that, as a practical matter, a national fraternal organization that is located many miles away without an employee on site cannot begin to effectively supervise and control the day-to-day activities of a local chapter, much less even know about and exercise reasonable care over such local matters. In reality, the imposition of a so-called “duty” under such circumstances would become “strict liability” in disguise.

This opinion agrees that a duty should not be imposed in the typical fraternity situation where there is no practical or realistic opportunity to alter the outcome merely because these Defendants had a fraternal relationship with the tort feisor.

There is an additional reason to deny liability based on a theory of respondeat superior of the National Fraternity, the house corporation, the alumni advisor and the chapter that was not made explicit in the opinion. The tort feisor was not an employee, servant or agent of the chapter or of the house corporation or the alumni advisor or the National Fraternity. Therefore, he was not subject to their control or right of control that lies at the foundation of respondeat superior. A similar analysis applies to the denial of alleged negligence based on a lack of duty of the chapter, the alumni advisor, the house corporation and the National Fraternity. Because the tort feisor was an adult and not a ward of any of said defendants and because he was not their employee, servant or agent, there was no special relationship creating a duty to control his behavior or a duty to protect the general public from his personal conduct.

This case analyzes these strictly fraternal relationships and presents solid reasons why liability, both vicarious and direct, should not be extended as a matter of law to national fraternities, house corporations, alumni advisors and fellow chapter members. A CAVEAT for all such Defendants is to avoid any involvement or communication which could reasonably be interpreted as creating or assuming a duty to supervise, oversee, manage or attempt to control the daily activities of a local chapter or members.

NOTE: the opinion has noted at the top "NOT RECOMMENDED FOR FULL-TEXT PUBLICATION." This

does not prevent the case from being cited, but you should provide a copy with your briefs since the Court's clerks may not be able to pull it up on their computers.

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COMMON LEGAL ISSUES FOR COLLEGE STUDENTS

Life as a college student can often feel removed from the real world. Students can easily get so caught up in campus activities, studies and general college life that life some times does not seem to exist off campus. However, students need to remember that their actions can often follow them after graduation. What seems so common to a college student does not seem so common to many others.

With that said, here is a basic primer on some basic alcohol laws and the consequences for breaking the laws. I am using the statutes of Ohio here, but most states have similar laws in place. Please reference the laws in your state, or consult an attorney, to determine the applicable criminal consequences for you.

- Underage consumption, purchasing or possession of alcohol. In Ohio, the penalty for consumption, purchasing or possession of alcohol by anyone before their 21st birthday is a first-degree misdemeanor, punishable up to six months imprisonment and/or a \$1,000 fine.
- Providing alcohol to a minor. This too is a first-degree misdemeanor with penalties up to six months imprisonment and/or \$1,000 fine.
- False identification. Possessing a false identification or displaying another person's valid identification as your own is a first-degree misdemeanor. However, if the identification is used to purchase alcohol or enter an establishment that serves alcohol, the minimum fine is \$250 and the person using the identification may have his or her driver's license suspended for up to three years.
- Driving while intoxicated. Known as OVI in Ohio, the "legal limit" blood alcohol content is .08. The maximum penalty for OVI is six months imprisonment (minimum at least 3 days in jail), a \$1,000 fine (minimum of \$250) or both. Driving privileges are also lost for at least six months.

- Open container. In Ohio, it is illegal to have an open container of alcohol in public. This varies greatly state to state. A common question about open containers is if it is illegal to have an open container, why are tailgates permitted before football games? Again, this law varies state to state. Further, there are time, place and manner restrictions that can be implemented. For example, an open container may be allowed in a campus parking lot on Homecoming, but not on a random Tuesday afternoon. The punishment in Ohio is a fine up to \$150.
- Hazing. As readers of *Fraternal Law* know, almost every state has a specific law against hazing. Hazing is a fourth-degree misdemeanor in Ohio, punishable by up to 30 days imprisonment or a fine up to \$250.
- Rioting and aggravated rioting. You can be charged with rioting if five or more persons are engaged in disorderly conduct (when one causes inconvenience, annoyance or alarm to another due to offensive conduct, or when one makes unreasonable noise in such a manner as to violate the peace and quiet of a neighborhood). Aggravated rioting occurs when violence is involved with rioting. Because only five people are necessary for "rioting," it is very easy for a fight at a party or for an argument between rival chapters to be considered rioting.

In addition to the legal consequences listed above, most schools include clauses in their student handbooks about student behavior. Just because an incident occurs off campus does not mean the school may not also discipline a student for violating the student code of conduct. These are just several areas of the law that are good to keep in mind and to reinforce to students that their conduct can have very real impacts long after they leave campus.

- Daniel J. McCarthy

ANOTHER HAZING AND DRINKING DEATH LEADS TO LAWSUIT

On September 22, 2010, a lawsuit¹ sadly entitled “Complaint for Wrongful Death of a Child” was filed against Delta Tau Delta, its House Corporation at Wabash College, the College itself and two of the officers of the Chapter. The suit grew out of the October 2008 death of Johnny Dupree Smith, who was at the time of his death, a freshman pledge of the Delta Tau Delta Chapter at Wabash. (Throughout the Complaint, the deceased is referred to as Johnny and this article will follow suit.)

The factual assertions in the Complaint allege numerous acts of hazing committed against Johnny. These include required participation in “chapel sing” where, according to the Complaint, freshman pledges from each chapter on campus compete to attempt to yell the Wabash school song the loudest. Because Johnny didn’t “perform to the satisfaction of the judges,” a large red “W” was spray painted on him. He and other pledges were required to spend long hours well into the early morning building a homecoming float. They were required to clean the Chapter House wearing nothing but an apron. They were only allowed to sleep a few hours each night and forced to take part in drinking sessions with their “fraternity dad” and other members of their fraternity family. At a homecoming party and a “pledge family drink night,” which followed it, Johnny was alleged to have drunk massive quantities of alcohol estimated in the Complaint as being between 13.8 and 21.6 alcoholic drinks. After spending the night on a mattress tossed on the fraternity house floor, Johnny was found dead the next morning. He had a blood alcohol content of “nearly .40 percent.”

The lawsuit brought in Montgomery County, Indiana

contains four separate counts. A claim of hazing in violation of Indiana law is made against the fraternity, the House Corporation and two officers. A dram shop claim (the improper distribution of alcohol) and negligent claims are made against the same defendants.

A separate negligence claim is made against Wabash College itself, which is alleged to have no alcohol policy and had a history of overlooking the abuse of alcohol by its fraternities. Wabash, an all male school, is dominated by its fraternities, which more than half of the students belong to, and whose houses are owned by the College.

The Complaint appears to confuse the house corporation with the chapter and asserts, without providing any explanation, that the national fraternity knew of the misconduct and, in fact, required much of it. The Complaint does acknowledge that Delta Tau Delta has an alcohol awareness program and that the pledges at Wabash were required to take the part in it.

The lawsuit is obviously in its early stages. Whether or not each of the defendants will ultimately be held liable remains to be seen, but clearly the conduct described in the Complaint is the antithesis of the brotherly concern that should be at the heart of the fraternal relationship. Had such consideration been uppermost in the minds of the chapter officers and members, it is hard to imagine that Johnny would have died just four months after his high school graduation.

• Timothy M. Burke

¹ Stacy and Robert Smith, personal representatives of the Estate of Johnny Dupree Smith v. Beta Psi Home Association of Delta Tau Delta, Inc. d/b/a Beta Psi Chapter of Delta Tau Delta, et al., Montgomery County Superior Court, State of Indiana, Cause No. 54D01 1009 CT 00346.

PHI DELTA THETA, OTHERS SUED

On October 18, 2010, Nicholas Brown and his family filed suit against Phi Delta Theta, its University of Arkansas chapter, the chapter’s house corporation, several officers and members of the chapter, and several university administrators.¹ The suit also names defendants John Doe 1-100 (the other members of the chapter). This litigation grew out of an alleged hazing and drinking incident that occurred on November 12, 2009 during which, according to the complaint, “Nick Brown was nearly killed.” The lawsuit describes in some detail allegations of excessive drinking in the Phi Delta Theta house that in the weeks preceding this event had resulted in two “alcohol-related medical transports.” According to claims made in the suit, Brown was urged to consume alcohol at the party faster than other new members and urged on by his “big brother” because his big brother had bet on him.

Ultimately, Brown passed out and was taken to the local hospital where his blood alcohol level was measured at .68. The doctors told Brown’s family that he “would almost certainly die due to the level of alcohol poisoning, but if he did

not die, he would be permanently brain dead or brain damaged.” In spite of that dire prediction, Brown was only hospitalized for several days and eventually left the hospital and returned to school. The lawsuit does not make clear what permanent injuries Brown has as a result of this incident, but makes claims for negligence and gross negligence, assault and battery, outrage, and also seeks temporary and permanent injunctive relief, as well as an unspecified amount of damages, including for loss of earning capacity.

Brown’s attorney has also indicated an intention to file separate litigation against the University of Arkansas for its alleged role in the events leading to Brown’s hospitalization. That lawsuit will have to be filed in a special Arkansas tribunal established to hear claims against state entities.

Phi Delta Theta, which enforces an alcohol-free housing policy, closed its University of Arkansas chapter. It later re-opened as a colony at Arkansas with entirely new members.

• Timothy M. Burke

¹ Brown, et al. v. Phi Delta Theta Fraternity, Inc., et al.; Case No. 60CV 2010 5939 Pulaski County Circuit Court, 3rd Division.

COLORADO COURT ISSUES IMPORTANT DISCOVERY DECISION

The parents of Brett Griffen, a pledge at the Sigma Alpha Mu ("SAM") chapter at the University of Delaware who died from excessive alcohol consumption, sued SAM, the Delta Lambda Chapter of SAM and numerous members of the fraternity in Delaware Superior Court. The plaintiffs asserted claims for negligence, negligence per se, gross negligence and/or reckless misconduct, survival and wrongful death.¹

During the discovery phase of the lawsuit, the plaintiffs motioned the Delaware court for commissions seeking a subpoena against James R. Favor in Colorado. SAM is a 1/7th owner of James R. Favor & Company, the insurance company that provides insurance programs for fraternities and sororities. The plaintiffs sought numerous documents from Favor, including documents related to broader topics not directly related to SAM, such as "studies or analyses of risk of harm arising from hazing, misuse of alcohol, or other misconduct during recruitment activities; evaluations of risk management policies, different types of risk management policies, and their relative effectiveness in reducing risk."

Favor filed a motion to quash the subpoena in the District Court of Denver, arguing, in part, that the subpoenas were overbroad, unreasonable, oppressive, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. After the court first determined that it had jurisdiction to hear the motion to quash and that Favor had standing to bring the motion, the court ultimately granted the motion and quashed the subpoena.²

The court started its analysis by looking at the basics of discoverable evidence. The Colorado rules of civil procedure, like almost every state and the federal rules of civil procedure, provide for broad discovery. Specifically, Colorado Civil Rule 26 provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.... Relevant information need not be admissible at the trial of the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

In discovery disputes, close cases are decided in favor of allowing discovery. The party opposing a discovery request has the burden of showing "good cause" that he is entitled to a protective order to protect from "annoyance, embarrassment, oppression, or undue burden or expense."

In this case, the plaintiffs argued "that the long-standing history of injuries and deaths during fraternity recruitment activities posed an unreasonable risk of harm, SAM knew this risk, and was negligent and engaged in reckless misconduct by failing to take reasonable steps to prevent that

harm from occurring." The plaintiffs sought the documents from Favor to establish that SAM knew the risks and foreseeability of harm to their son and other pledges.

Favor argued that, pursuant to *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del. 1991), national fraternities are generally not responsible for the daily supervision of local chapters. Accordingly, Favor argued that the discovery of all documents from every SAM chapter as well as all fraternal organizations insured by James R. Favor & Company were not properly discoverable. Favor also argued that most of the requested documents were not only irrelevant to the plaintiffs' case, but also confidential business records and proprietary in nature.

"What actual knowledge or notice SAM may have had about other local chapters across the country or what knowledge Favor may have about other fraternity/sorority/owners is irrelevant to the underlying Delaware action."

The court then examined case law from around the country on the topic of a national organization's liability for the actions of a local chapter. The court noted that the case law related to the national's liability in other jurisdictions has focused on the key issue of whether the national organization had specific knowledge of hazing at the relevant chapter. Generally speaking, if the national organization had no knowledge or notice of the alleged hazing, no liability has attached.

Following that case law, the court held, "It is clear that the knowledge and notice, which is relevant to Plaintiffs' case against SAM is that which would illustrate SAM had knowledge or notice about hazing and excessive alcohol consumption by members of Delta Lambda, the local SAM chapter at the University of Delaware. What actual knowledge or notice SAM may have had about other local chapters across the country or what knowledge Favor may have about other fraternity/sorority/owners is irrelevant to the underlying Delaware action."

Though this opinion is just from a trial court in Denver, this is a good precedent for national organizations and insurance companies to use in hazing-related lawsuits. Plaintiffs' attorneys will often ask for every possible document under the sun. This decision helps define the limitations for what is relevant and subject to discovery.

• Daniel J. McCarthy

¹Case No. C.A. 09C-04-067 JAP.

²See *Timothy Griffen and Julie Griffen v. Sigma Alpha Mu Fraternity, et al.*, Case No. 2009 CV 11308, District Court, City and County of Denver, Colorado.

NEW SMALL BUSINESS AND NONPROFIT HEALTH CARE TAX CREDIT

The Patient Protection and Affordable Care Act, P. L. 111-148, signed into law by President Barack Obama on March 23, 2010, provides a health care tax credit for qualified small businesses and 501(c) organizations exempt from taxation under Section 501(a). 26 U.S.C. §45R. A qualifying small business or a qualifying tax-exempt organization has fewer than 25 full-time equivalent employees (FTE) who earn an average of less than \$50,000 per FTE. There are a number of steps to be followed to determine whether the employer is eligible for the credit. (This is a very simplified introduction to this credit.)

The first step is to determine which employees of the organization are taken into account. Neither owners nor partners, for example, are taken into account in the formulas that follow. Then, determine the number of hours worked by those employees. (Include actual hours worked and hours for vacation, holidays, and illness for which the employee was paid, but not more than 2080 hours for any individual.) Take the total hours worked and divide that number by 2080, rounding down to the next lowest whole number. This yields the number of FTEs who work for the employer.

If this total is less than 25 FTEs, find the sum of the total annual wages of these employees. Divide the total wages paid by the total number of FTE positions arrived at, above. If the result is less than \$50,000, go on to the insurance premium part of the qualification test.

The Department of Health and Human Services has calculated the average premium for the small group market in each state. The credit is determined by taking the percent-

age of the insurance premium paid by the employer and applying that to the small group market average premium. For example, the employer pays 50% of both the single coverage and family coverage of the relevant employees. The credit is calculated by using the lesser of the actual premiums paid by the employer or 50% of the small group market premiums for the number of employees electing single coverage plus the number of employees electing family coverage. (Payments for health insurance coverage made by an employer under a section 125 cafeteria plan do not count.)

The next part of the credit calculation changes each year for tax years 2010 through 2014. The 2010 credit calculation uses 35% of the figure arrived at in the previous paragraph for small businesses and 25% of that figure for tax-exempt employers. The credit is then applied against the taxable income of the business, it is a refundable credit for tax-exempt employers, capped at the total amount of income and Medicare tax withheld from its employees plus the employer share of the Medicare tax on the employees' income. The IRS has published a draft of Form 8941, "Credit for Small Employer Health Insurance Premiums," that will be used by both small businesses and tax-exempt organizations when filing for tax year 2010. IRS also has extensive information available on its web site, <http://www.irs.gov>.

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CALIFORNIA ESTABLISHES SOCIAL HOST LIABILITY

California recently enacted two bills regarding social host liability. Assembly Bill 2486 established social host liability to adults who consciously provide alcohol to minors who are subsequently injured or killed as a result of their drinking. The bill narrowly defines "social hosts" to someone who is 21 years of age or older and who knowingly furnishes alcoholic beverages to a person under 21 years of age. Further, the definition is limited to "natural persons" who provide alcohol to guests at his or her residence with no motive for pecuniary gain regardless of whether any payment is given for the alcohol. Licensed or commercial vendors are not social hosts under the bill. This bill simply brings California in line with the vast majority of the other states. Before this bill, California was among only a handful of states that provided for no social host liability.

A companion bill, Assembly Bill 1999, known as "Shelby's Law," grants immunity from prosecution to underage drinkers seeking medical help for themselves or their

peers. Underage drinking is ordinarily a misdemeanor in California. "Shelby's Law" was enacted following the death of 17-year-old Shelby Lyn Allen. She died shortly before Christmas in 2008. She was playing a drinking game at a friend's house, drank approximately 15 shots of vodka, and died in the friend's bathroom. The goal of the law is to encourage underage drinkers to seek medical help when necessary without the fear that they may be arrested. The General Assembly hopes that "Shelby's Law" will save lives and that underage drinkers, or their friends, err on the side of caution and seek medical assistance, rather than simply hoping for the best and avoiding medical help because of a fear of criminal charges.

• Daniel J. McCarthy

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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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