



LINDABURY

McCORMICK, ESTABROOK & COOPER, P.C.

Attorneys at Law

EdLawAlert

By the EdLaw Group at Lindabury

June 15, 2010

The EDUCATION LAW GROUP at Lindabury has extensive experience in the area of school law. We serve as general counsel, special education counsel, and labor counsel for boards of education throughout the State.

ANTHONY P. SCIARRILLO
ATHINA LEKAS CORNELL
JEFFREY R. MERLINO
DENNIS MCKEEVER
LISA M. GINGELESKIE
JENNIFER A. OSBORNE
PAUL E. GRIGGS
JOSHUA S. SKLARIN

edlawgroup@lindabury.com

Westfield Office

P. O. Box 2369
53 Cardinal Drive
Westfield, NJ 07091
(TEL) 908-233-6800
(FAX) 908-518-2967

Summit Office

480 Morris Avenue
Summit, NJ 07901
(TEL) 908-273-1212
(FAX) 908-273-8922

Rumson Office

20 Bingham Avenue
Rumson, NJ 07760
(TEL) 732-741-7777
(FAX) 732-758-1879

www.lindabury.com

2325926v1

Appellate Decision Preserves Charitable Immunity for University in Student's Alcohol Related Accidental Death

By Jennifer A. Osborne

Late last year, the New Jersey Appellate Division reversed a trial court's decision initially finding Fairleigh Dickinson University (FDU) equally negligent in causing a student's accidental death. In *Orzech v. Fairleigh Dickinson University*, the trial court found that at the time of the accident FDU was not engaged in the charitable objectives it was organized to advance and therefore the student was not a beneficiary of those objectives. Accordingly, the trial court denied FDU's claim of immunity under the Charitable Immunity Act (the Act), *N.J.S.A.* 2A:53A-7 to 11. The Appellate Division reversed.

Keith Orzech, a twenty-one year old student and resident advisor (RA) at FDU's Park Avenue Residence Hall, accidentally fell to his death from his fourth floor dormitory window on or about July 1, 2005. While working as an RA, Orzech's responsibilities included alerting the university's Public Safety Department (Department) to any observed violations of the school's alcohol policy. The university's residence hall alcohol policy prohibited the possession or consumption of alcohol, regardless of age, in some residence halls. Park Avenue residents of legal drinking age were permitted to have alcohol in their rooms for personal consumption. However, gatherings where alcohol was visible or available to all people present were prohibited. The policy also prohibited the use of grain alcohol, the consumption of alcohol to the point of intoxication, and games that encouraged excessive drinking.

On or about June 30, 2005, Orzech purchased alcohol for a party in his suite. Approximately 10 people were present, including underage guests. All attendees consumed alcohol, including grain alcohol. Party participants played drinking games, and during the course of the party, Orzech became "extremely intoxicated." Orzech went to bed sometime between 2:00 and 2:30 a.m. on the morning of July 1, 2005. At about 3:00 a.m., Orzech's suite mate checked on him and observed that he was "fine." At about 4:20 a.m. a Public Safety officer patrolled the area where Orzech's body was later found and observed nothing unusual. Orzech's body was later discovered in that location at approximately 9:00 a.m. the next morning. The Prosecutor's Office determined that Orzech leaned out of his window sometime between 4:20 a.m. and 9:00 a.m., and accidentally fell to his death. Orzech's blood alcohol content at the time of his death was 0.166%.

FDU's Public Safety Department was responsible for enforcing the school's alcohol policy, which included performing periodic (cont'd ➔)

residence hall checks. Department checks for noise would only be conducted upon receipt of a noise complaint. RAs were responsible for informing the Department of possible policy violations. On the night of the incident, RA reports were not received regarding the party in Orzech's suite. The Public Safety officer on duty that night said he never heard nor saw anything he believed required a response.

At trial, FDU moved for summary judgment on the basis of charitable immunity. The trial court noted that because FDU did not enforce its alcohol policy and because Orzech "egregiously violated the policy," FDU was not entitled to immunity under the Act. In short, at the time of the accident FDU was not engaged in the charitable objectives it was organized to advance, and therefore, Orzech was not truly a beneficiary of those objectives.

The Act provides as follows:

No nonprofit...association organized exclusively for...educational purposes...shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such...association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit...association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such...association...where such person is one unconcerned in and unrelated to and outside of the benefactions of such...association... *Nothing in this section shall be deemed to grant immunity to...any...employee, agent...or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission...N.J.S.A. 2A:53-7.* (Emphasis added).

In summary, the elements needed to support a claim for charitable immunity are: (1) that the entity asserting immunity was formed for nonprofit purposes; (2) that it is organized exclusively for educational purposes; and (3) that it promoted such purposes at the time of the injury to the plaintiff, who was then a beneficiary to whatever degree, of its charitable works. (See *Loder v. St. Thomas Greek Orthodox Church*, 295 N.J. Super. 297, 301 (App. Div. 1996).) FDU easily met the first two elements of the test, however, the question was whether element number three was met in this case. In order "for a person to be deemed a beneficiary, he or she must be

receiving, at the time of the accident, the benefactions of the charitable organization 'at least in some degree,' so as not to be 'unconcerned in and unrelated to and outside of the [entity's] benefactions.'"

The Appellate Division examined various cases on the issue of individuals receiving benefactions of the charitable organization at the time of the accident, and determined that merely being a student at a particular university does not automatically make that individual a beneficiary of that educational institution. However, the Appellate Division also concluded that a student, while living in a dormitory, is receiving the benefits of the school's educational works, at least to some degree, for purposes of satisfying the beneficiary status under the Act. Therefore, the Court reasoned that "a dormitory resident injured in the dormitory as a result of the negligence of the university or its employees or agents would generally *be barred from suing* the university or its employees or agents." (Emphasis added). Specifically, the Court noted:

The allegations against FDU, and the findings of the jury, were limited to simple negligence. Negligence, of course, requires a breach of a duty imposed by law, causing injury. By definition, negligence is a form of wrongdoing. FDU's wrongdoing in this case was either that it did not have in place an adequate alcohol policy for its students or it did not adequately enforce the policy it did have. Either way, the wrongdoing rose to no higher a level of culpability than negligence.

Accordingly, the Appellate Division held that all negligence must be treated the same under the Act. Therefore, if the conduct is limited to simple negligence, and all elements of the Act are satisfied, the immunity applies. In this case, the test was met and the Appellate Division reversed the findings of the trial court, noting that FDU was immune from damages under the charitable immunity statute.

✂

The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarriello of the EdLaw Group at edlawgroup@lindabury.com.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

*You may, if this letter is inaccurate or misleading, report same to the
Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625.*