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Thomas B. Cronmiller
585.295.4424
tcronmiller@hbblaw.com

Gary H. Abelson
Jessica M. Baker
Nikki L. Baldwin
Frank V. Balon
Robert A. Barrer
Neil D. Breslin
Samuel J. Burruano
David B. Cabaniss
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Third Department Dismisses Wrongful Death Action Against a Property Owner Where the Decedent was a Trespasser

In *Elwood v. Alpha Sigma Phi, Iota Chapter of Alpha Sigma Phi Fraternity, Inc.*, the Third Department recently granted summary judgment dismissing a wrongful death action against a property owner, determining that the decedent was an unforeseeable visitor on defendant's property, as a matter of law.

The decedent's estate commenced an action against Alpha Sigma Phi ("the Fraternity") for an accident occurring on property owned by the Fraternity. On the night of the decedent's accident, the decedent and a friend were driving in a vehicle trying to locate a party taking place at a different fraternity house near the Cornell University campus. The decedent and his friend drove beyond two signs that indicated that the street they were on was closed to all traffic except local traffic because the bridge over a nearby gorge was closed. Although neither the decedent nor his friend were members or guests of the Fraternity, they nevertheless drove along the Fraternity's private drive and into the Fraternity's private parking lot where they parked the car illegally in a fire lane. It was after 10:00 PM and there were no events taking place at the Fraternity. The decedent and his friend exited the vehicle and were spotted by a member of the Fraternity who questioned them about their presence on the Fraternity's property. Ignoring the inquiry, the decedent and his friend began to walk along a sloping, unlit pathway that ran along side and to the rear of the Fraternity's house. Believing the pair to be vandals, the Fraternity member went inside to yell for assistance and thereafter proceeded in the direction where the pair had headed, and heard a crash.

The Fraternity member found the decedent's friend standing alone beside a five-foot high split-rail fence on the Fraternity's premises that separated the path from a gorge. The decedent had apparently crossed to the other side of the fence (the fence had no gate or gap and the fence was found intact after the decedent's accident) and walked about six feet through dense foliage and fell 80 feet to his death. Later, the decedent's blood alcohol level was found to be .26%.

In their complaint against the Fraternity, decedent's estate alleged that the Fraternity was negligent in maintaining their premises because it failed to adequately warn and guard against the danger of persons falling into the gorge. After discovery was completed, the Fraternity moved for summary judgment on the grounds that (i.)it owed no duty to the decedent because the gorge was an open and obvious natural hazard, (ii.)that decedent's intoxication was a superseding cause of his fall, and

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(iii.)that decedent was a trespasser whose presence was unforeseeable.

Although the Third Department found that questions of fact existed on the first two grounds listed above, the Third Department granted summary judgment dismissing the estate's wrongful death action against the Fraternity on the third ground listed above. The Third Department held that it was unforeseeable, as a matter of law, that the decedent would trespass onto defendant's private property, cross to the far side of its fence, and fall into the gorge.

The Third Department noted that a property owner's obligation to maintain its property in a reasonably safe condition is measured by foreseeability and that no liability arises where the injured party's presence is not reasonably foreseeable. The Third Department stated that the likelihood of trespassers entering property depends upon the location of the property in relation to populated areas, the property's accessibility, and whether there have been any prior incidents of trespassing in the area where the injury occurred. The Third Department also noted that questions of foreseeability are generally left to the finder of fact, but that courts will sometimes resolve the question of foreseeability as a matter of law where the relevant facts are undisputed and only one inference can be drawn.

Here, the record included deposition testimonies of the Fraternity's president, the Fraternity's adviser and members of the Fraternity which demonstrated that visitors, guests, and non-member college students did not use the secluded areas on the Fraternity's property near the gorge. In addition, the evidence demonstrated that the Fraternity rarely used that part of the premises and in those rare cases the only persons who used that area were Fraternity members who were aware of the location of the gorge. The Third Department also noted that there was no evidence that there had ever been guests (invited or otherwise) in the area by the gorge. Additionally, there was no evidence that anyone had ever trespassed in the area which the decedent fell, that there were any prior accidents caused by the proximity of the area to the gorge, or that defendant's fence had ever failed to prevent anyone from reaching the edge of the gorge.

Because the estate was unable to establish that the decedent's presence was anything other than a singular, unexpected and unusual event, the Third Department held that the Fraternity's duty of care did not extend to the decedent. ■

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