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INTOXICATED YOUTH LEAVES PARK, HITS CYCLIST WHO SUES COUNTY

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One of the recurring themes in recreational injury law is landowner liability for the negligent or criminal ads of third parties who become intoxicated on the premises. This has been evident in the cases described in the *Recreation and Parks Law Reporter* (RPLR). In one such case (RPLR Report No. 84-20), a 19-year-old woman consumed 15 to 20 drinks on a ferry cruise in Washington state. Returning home from the cruise, she seriously injured herself in a one-car accident. She then sued the sponsors of the cruise, the city, and the ferry system for negligence in providing alcohol to a minor without ascertaining her age.

This month's column describes another recent case from Washington state involving an intoxicated youth. Despite a ban on alcohol in the park, the defendant/county in this particular instance knew that alcohol was being consumed at a certain area in the park. This is a commonplace situation in many public park areas. To what extent does knowledge of the problem and the failure to vigorously enforce the ban on alcohol subject the public landowner to liability when someone who becomes intoxicated in the park leaves and injures someone? The case described herein presents the analysis of one appellate court on this issue.

HAVEN FOR ALCOHOL CONSUMPTION

In the case of *Hostetler v. Ward*, Wash.App., 704 P,2d 1193(1985), defendant Joel Ward, a minor, became intoxicated in a public park maintained by defendant Pierce County. Ward then drove his parents' car out of the park a short distance on a public highway and struck a motor-cyclist, Gerald Hostetler. According to plaintiff, the circumstances surrounding the incident were as follows:

> Pierce County owns or controls a park on the shores of Lake Trapps. At 7 p.m. on June 29, 1981, Joel E. Ward, Norman K. Herbert, and James Joseph Shockley, all under age 21, paid a $1 fee to drive Ward's parents' station wagon into the park. They drove to an isolated area in the park known as Evergreen Point, which was out of view of park personnel, where others were drinking alcoholic beverages. There the three youths consumed forty-eight 12 oz. cans of beer divided equally among the three. At approximately 10p.m., a county official "gave notice to the youths and others of the park's impending closure and directed their transportation to the park roadway Ward and his companions were "considerably handicapped' from drinking the beer. In adherence to the county official's directive, Ward drove out of the park and travelled approximately three to four miles on the public highway before he negligently turned left into the path of an oncoming motorcycle driven by Gerald O. Hostetler.

Hostetler suffered severe injuries which rendered him incompetent. Hostetler, through his

guardian, sued Ward and the County. The trial court, however, dismissed the claim against the County. Hostetler appealed.

Hostetler argued that the County was "liable for maintaining the park as a haven for the consumption of alcoholic beverages by minors." Specifically, Hostetler alleged the following:

> County officials knew the Evergreen Point area was used regularly by many people, including minors for the consumption of alcoholic beverages. A sign was posted notifying visitors that liquor was banned from the park. When the park's resident caretaker encountered persons drinking liquor, he would advise them it was prohibited. Both Herbert and Shockley, Ward's companions, were aware of the prohibition.

In August 1977, a member of the Pierce County Sheriff's Department investigated the area. His report included the following: "The area known as Evergreen Point . . . is being utilized by persons for the purposes of consuming alcoholic beverages and drugs out of line of sight by park personnel. This area should be closed off."

In his deposition, the park's caretaker indicated that "people drinking liquor in the Evergreen Point area could not be apprehended easily because they could see approaching law enforcement officers from a long distance." Given the area's remote location, however, the caretaker did concede that "closing the park road to the area would have prevented park visitors from using that area for drinking alcoholic beverages."

As described by the appeals court, the essential elements of a negligence action are: (1) the existence of a duty owed to the complaining i.e. injured] party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause relationship between the claimed breach and the resulting injury.

In Washington, the court acknowledged that "the furnishing of liquor to an able-bodied person generally is not actionable." As a result, the court rejected Hostetler's argument that "the County, by virtue of its ownership and control of the park, had a common law duty to prevent Ward from being intoxicated in the park." (In this context, the 'common law" is judge-made law, i.e. that tradition of general legal principles derived from court decisions over generations) As described by the court, "the relationship between one who, at most tolerates the consumption of alcohol on his premises, but does not have immediate control over that consumption, does not impose a duty upon the owner of the premises to regulate the liquor consumption."

The appeals court also considered Hostetler's contention that the County's failure to prevent Ward and his companions from consuming liquor in the park violated a state statute making it unlawful to "permit" minors to consume alcohol on the premises RCW 66.44.270). In the opinion of the court, the term "permit" as used in this statute referred to "something more than a mere indifference or passive sufferance" and required "an affirmative content." Under the circumstances of this case, the court found that "the County in its role as property owner did not

have sufficient control over the activities in the park to justify a finding that it permitted Ward to consume Liquor on its premises." The court found further that this particular statute was inapplicable since it was apparently "designed to protect minors from injuries resulting from their abuse of alcoholic beverages, not to protect third parties [like Hostetler] injured by intoxicated minors."

Hostetler had also argued an alternative theory of liability based upon the law of nuisance. Like negligence, nuisance is also a tort, i.e. civil wrong. Nuisance, however, is "a distinct civil wrong consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.'' Specifically, Hostetler alleged that the County's negligence in permitting minors and others to consume liquor in the park constituted a nuisance, A state statute (RCW 7.48120) defined "nuisance" as follows:

> Nuisance consists in unlawfully doing all act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health, or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, (anal or basin, or any public park, square, street or highway; Or in any way renders other persons insecure in life, or in the use of property.

In the opinion of the court, the alleged nuisance in this case was indistinguishable from Hostetler's allegations of negligence. "If the drinking in the park by minors and others, and their subsequent ventures onto the highway, constituted a nuisance, the nuisance was the result of the County's negligence in failing to enforce the laws and ordinances prohibiting such drinking." According to the court, in cases such as this "where allegedly a nuisance is the result of negligence, rules applicable to negligence should be applied." The court, therefore, "refused to consider separately this negligence claim presented in the garb of nuisance."

Hostetler also contended that the County was "liable for Ward's tortious conduct because it failed to enforce certain laws pertaining to the control of alcoholic beverages." A state statute in effect at the time of the incident provided that no intoxicated person shall remain in any public place, including a public park. Another statute, cited above, prohibited individuals from permitting minors to consume alcohol on the premises. In addition a county ordinance made it unlawful for any person to open and consume alcoholic beverages in a park.

As described by the appeals court, police officers are ordinarily not liable for failing to enforce a duty owed to general public. On the other hand, liability will be imposed where injured party is a member of a protected class or a special relationship exists.

> The public duty doctrine recognizes that the duties of public officers are normally owed only to the general public and that a breach of such duty will not support a cause of action of an individual injured thereby.
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> However in two classes of cases, our courts have recognized exceptions to the

> public duty doctrine. First, if there is a clear statement of legislative intent to identify and protect a particular and circumscribed class of persons, a member of that class has an individual claim for violation of the ordinance or statute creating the duty . - Second, if a "special relationship exists between the public officer and the plaintiff, a duty owed to the individual may arise. Such a special relationship has been found where: (1) there is a privity [close connection] between the governmental agent and the injured party: and (2) the injured party relied upon the governmental agent's assurance of protection.

In the opinion of the court, neither of the exceptions, protected class or special relationship, to the public duty doctrine applied under the circumstances of this case.

> First, with regard to the liquor control laws that allegedly were not enforced, plaintiff has cited no authority, and we are aware of none, that provides a clear statement of legislative intent to identify and protect a particular and circumscribed class of persons of which Gerald Hostetler is a member, Second, there is no "special relationship" between Hostetler and the County employee that would impose a duty upon the employee to protect Hostetler's safety. The employee was not in contact with Hostetler; therefore, there was no privity between them, nor did Hostetler rely upon the employee for protection.

The court, therefore, concluded that "the county's failure to enforce its ordinance and the statutes is not negligence that is actionable by Hostetler" under the public duty doctrine.

Finally, the appeals court considered Hostetler's argument that the County was "liable for the negligence of its official in giving notice to the youths and others of the park's impending closure and directing their transportation to the public roadway." In rare instances, the court acknowledged that "a person may be liable for failing to take reasonable precautions to protect anyone who foreseeably might be endangered by the conduct of a third party [in this case Ward]." However, the court noted that such liability only arises "when the defendant is in a special relationship with the third party that imposes upon the defendant a duty to control the third party's conduct." Similarly, the *Restatement (Second) of Torts* §§3l5(a), 319 referenced by the court would impose liability for the negligent conduct of a third party under the following circumstances:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others is not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Applying these principles to the facts of the case, the appeals court found there was "no allegation or evidence that the county employee made any direct contact with Ward individually or assumed responsibility for his conduct."

> [T]he employee may have known that Ward was drinking in the park, and may

> have ordered a group of park visitors, including Ward, to leave at closing time. However, at no time did the employee exercise sufficient control over Ward to impose upon the employee a duty to prevent Ward from becoming intoxicated or venturing onto the highway in that condition. Indeed, the employee had no authority to arrest Ward. Our cases have imposed liability upon a governmental entity for breach of a duty to control third persons only in unusual cases involving full control over the third party tortfeasor [in this case Ward].
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> Moreover, although Hostetler alleged that Ward was "handicapped" by the intoxicants he consumed, nowhere has he alleged that the county employee knew Ward was intoxicated, or that he intended to drive a car. A person's sobriety must be judged by the way he appears to those around him. Assuming the County official had "taken charge" of Ward, the failure to allege that the official know Ward was "obviously intoxicated" is fatal to plaintiff's theory of recovery.

The appeals court, therefore, found that "the trial court was correct in dismissing Hostetler's actions against Pierce County." Summary judgment for defendant Pierce County affirmed.