

DANCING TEEN DIES AFTER BEING RUN OVER BY PARADE FLOAT

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In the case of *Donovan v. West Indian American Day Carnival Association*, 2005 NY Slip Op 50052U; 2005 N.Y. Misc. LEXIS 99 (2005), plaintiff Mona Donovan brought a negligence and wrongful death action after her 17-year-old son, Shernon Kevon Donovan, was fatally injured during the 1999 West Indian American Day festival and parade. The festival and parade was an annual heritage event held on Labor Day in Kings County, New York. This event had been sponsored for more than two decades by the West Indian American Day Carnival Association (WIADCA). The City of New York had issued WIADCA the required permit to conduct the festival and parade. The parade proceeded a substantial distance along a parkway and included “motorized floats and walking participants; specifically, steel drum and other musical bands riding on flatbed trailers and costumed masquerade bands walking the parade route.”

FACTS OF THE CASE

Prior to the parade, one or more meetings were conducted and/or attended by the New York City Police Department (NYPD), WIADCA, participants and volunteers where certain parade issues were discussed, including the proper insurance and safe equipping of participating tractors and flatbed trailers.

On the day of the parade, the NYPD detailed numerous equipment and officers to the parade, including 3,000 uniformed officers. Wooden and steel police barriers were erected on or near the sidewalks along the length of the parade route to separate the enormous crowd of spectators from the parade participants. At least two uniformed police officers were assigned to each float, including one assigned to ride in the cab of each flatbed tractor trailer with its driver. In addition, general volunteers and/or volunteers, specifically designated by each band served as parade spotters or marshals, marched with the bands along the parade route for the purpose of ensuring or attempting to ensure that the parade continued to flow smoothly along the parkway.

The Burning Flames, a five member musical band, rode and performed on the flatbed driven by defendant Hugh Bennett. In addition to the police presence, several volunteers accompanied the Burning Flames' float, acting as parade marshals or spotters and attempting to keep the crowd of spectators from obstructing the tractor trailer's progress, from getting too close to the tractor trailer and its wheels and/or from attempting to climb up onto the flatbed. Three spotters were in front of the Burning Flames float at the time of the incident. Band members with microphones told spectators not to climb up on the trailer and to be careful. Spectators were also told to stay away from the trailer and steer clear of its wheels. The flatbed trailer proceeded along the parade route extremely slowly and never exceeded 5 to 8 m.p.h..

Despite the large police presence and numerous barricades, many parade spectators and revelers, including the decedent and decedent's step-brother, Ryan Girard, breached the barricades and entered the parade route. Some merely walked or danced alongside the different floats and with the costumed parade participants, while others tried to jump or climb up onto the different floats.

During the parade, the Burning Flames threw T-shirts from the flatbed and, at or near the time of the incident, performed a song whose vocals encouraged listeners to run, jump, wave, dance forward, dance back, move to the left and/or move to the right.

Mr. Girard testified that after he and decedent had breached the police barricades, they caught up with the Burning Flames float, and danced near the driver's side of the flatbed trailer for approximately fifteen

minutes or two to three blocks prior to the accident. Mr. Girard further testified that, just prior to the incident, he and decedent were the same distance (within an arm's length) away from the trailer and were both holding onto the plywood railing. At some point, Mr. Girard touched decedent's shoulder and told decedent that he was walking too close to the trailer and should move back, away from the trailer. At that point, the trailer was stopped.

According to Mr. Girard, decedent let go of the trailer and moved away. Mr. Girard then turned away from decedent and began to dance with another reveler. He next saw decedent approximately one minute later, when decedent called out to him. At that point, decedent's foot had already been caught under the trailer's wheels and the trailer was slowly moving up decedent's leg and person. Decedent was transported to hospital and subsequently died from his injuries.

Witnesses allegedly reported having seen a large yellow snake and claimed to have been "told" that decedent walked between the tractor cab and trailer to avoid the snake. One witness in particular said that he personally saw decedent dancing separately from two males who were dancing with a large snake and "observed decedent step between the tractor trailer's air tank and rear dual tires to avoid the snake, at which point the accident occurred." Similarly, several witnesses testified they "saw someone carrying a large white or albino snake near the Burning Flames trailer just prior to the accident" which prompted the following crowd reaction:

Immediately prior to the snake's appearance, the crowd had been dancing and walking alongside and keeping pace with the float. Once the snake appeared near the trailer, the crowd began to scream and to scatter and the band stopped playing. The crowd scattered and "stampeded" in all directions and some came closer to and tried to jump onto the trailer. Immediately thereafter, the crowd began to "chatter" that someone's foot had been run over.

Because the accident involved a fatality, a further investigation of the incident was conducted by the NYPD Accident Investigation Squad. The accident investigation revealed no relevant mechanical problems with the tractor trailer vehicle. It noted that the vehicle was proceeding "straight" at the time of the accident and that there were no skidmarks on the roadway.

The police accident investigation report concluded that decedent walked into the tractor trailer's wheels during the parade and "the accident was caused by pedestrian error." A subsequent administrative hearing by the department of motor vehicles determined that decedent "was frightened by a snake, and attempted to climb between the rear of the tractor and the front of the float and fell beneath the rear wheels of the tractor."

MUNICIPAL IMMUNITY

In her complaint, plaintiff alleged that the defendant City of New York "was negligent in the planning, supervision and management of the 1999 West Indian American Day parade, in failing to supervise the crowd and in failing to exercise reasonable care against foreseeable dangers." In response, the City claimed it was immune from any liability for negligence since plaintiff's claims arose from "discretionary governmental functions," i.e., the issuance of a parade permit, monitoring of the parade, provision of a security plan and traffic regulation.

As noted by the court, municipalities are generally "immune from negligence claims arising out of the performance of its governmental functions," including police protection services, unless "a special relationship exists between the municipality and the injured person thereby creating a 'special duty' of protection with respect to that individual." Applying this rule to the facts of the case, the court found that

the City had “demonstrated that the parade-related duties in question, including permit issuance, traffic regulation and crowd control, are governmental duties designed to protect all parade spectators and not any person in particular and within the NYPD’s discretion.” Further, the court found “no special relationship existed between decedent and the City and that decedent did not in any manner rely upon any action undertaken by the police.” On the contrary, the court only found evidence that “decedent’s own negligent actions were the proximate cause of his accident and death.” As a result, the court granted the City’s motion for summary judgment based upon governmental immunity.

VEHICLE OPERATOR

In her complaint, plaintiff had alleged that the driver of the flatbed trailer, Hugh Bennett, had negligently and illegally operated his “by driving the flatbed tractor trailer through a swarming crowd that appeared dangerously close, although he was aware of parade spectators attempting to climb onto the tractor trailer.” As noted by the court, “a party cannot be found liable unless the alleged negligence was a proximate cause of the accident.” Under the circumstances of this case, the court found no evidence that Bennett’s operation of the flatbed truck contributed in any way to the accident.

Here, there is absolutely nothing in the record to indicate either that decedent was a “climbing” spectator or that he lost his balance attempting such a feat due to Mr. Bennett’s conscious disregard of an obvious hazard and failure to immediately stop the vehicle. Further, there is no evidence that Mr. Bennett either actually observed or should have observed decedent for any significant period of time prior to the accident or knew or somehow should have known that decedent had placed himself into an immediately hazardous position, and was, thus, in a position to take any steps to either reasonably foresee or avoid the specific collision between the vehicle and decedent.

In the absence of any evidence of negligence in his operation of the flatbed truck, the court granted summary judgment in favor of defendant Bennett.

BURNING FLAMES

In her complaint, plaintiff had further alleged that the defendant band members of the Burning Flames were negligent in failing to instruct their volunteers in their parade spotter duties and arriving “fashionably late” at the parade.” In addition, plaintiff alleged that the Burning Flames had negligently encouraged “their fans and the crowd to get dangerously close to their flatbed by tossing t-shirts and “rousing the crowd into a line dance paralleling the moving truck.” Similarly, plaintiff alleged that WIADCA was “negligent in the performance of its purported supervisory function as parade sponsor and organizer by showing little concern for crowd safety.” The Burning Flames and WIADCA both denied any legal basis for liability and asserted the following:

(1) the risks inherent in decedent’s recreational activity were open and obvious, not concealed from his view, and of which he should have been reasonably aware; (2) despite their exercise of reasonable care, decedent knowingly and voluntarily placed himself in harm’s way; and (3) the actual and proximate cause of the accident was decedent’s independent exercise of judgment and his own or another, unrelated, individual’s unfortunate and unforeseeable superseding conduct.

As noted by the court, in order to hold defendants liable, plaintiff was required to “demonstrate a duty to decedent, a breach of that duty and causation.” Moreover, the court noted that “a negligent act is considered the proximate cause of an injury only if that act was also a substantial factor in bringing about the injury.” In addition, a negligent act “is not to be regarded as a proximate cause unless it is in clear

sequence with the result and unless it could have been reasonably anticipated that the consequences complained of would result from the alleged wrongful act.” Further, the court noted that a “general awareness” of a dangerous condition was insufficient to constitute notice that a particular incident might occur.

Applying these principles to the facts of the case, the court concluded that the defendants could not have reasonably anticipated that the fatal accident would result as a consequence of “many parade spectators customarily cross[ing] barricades to enter the street and dance or walk alongside the motorized floats.” Rather, in the opinion of the court, evidence on the record demonstrated that “general parade volunteers and Burning Flames friends and volunteers, as well as the band members themselves, repeatedly warned the crowd not to attempt to jump or climb onto the flatbed tractor trailer and to back away from and not to get too close to the vehicle and its tires.” As a result, the court found “no basis for liability” on the part of the Burning Flames and/or WIADCA.

The court also rejected plaintiff’s argument that “the Burning Flames’ alleged actions in throwing T-shirts or even in encouraging spectators to dance near the flatbed trailer were a substantial cause of decedent’s accident.”

To the extent plaintiff alleges that the Burning Flames created a snare or “trap for the unwary, too perilous to be endured” by throwing T-shirts and/or allegedly encouraging spectators to dance near the float, there is no evidence that the band was throwing T-shirts at the time of the accident or that decedent was attempting to obtain a T-shirt and no evidence that decedent was dancing as the band allegedly commanded, or even dancing at all, as opposed to merely walking... [Further,] the large motorized flatbed trailer was an open and obvious condition of his dance floor, a dance floor decedent improperly entered by breaching one or more police barriers, and the condition of which decedent voluntarily assumed by commencing and continuing this activity.

In the opinion of the court, neither the Burning Flames nor WIADCA were required to anticipate that decedent would ill-advisedly step into the path of the trailer’s tires or into the area between the tractor cab and front trailer tires to remove himself from the crowd conditions. Moreover, the court found that the sudden appearance of a large snake in the crowd was “clearly an unfortunate and unforeseeable event” which had not “existed near the Burning Flames float for a sufficient period of time to allow its correction by any defendant.”

Accordingly, the court found that WIADCA and the Burning Flames had “acted reasonably and breached no applicable duty to decedent.” While defendants, at most, may have “fortuitously created or furnished the condition for decedent’s accident,” there was no evidence that “the band and their volunteers did not perform their crowd control functions with reasonable care or that the accident was caused by the band’s improper training or supervision of their members and volunteers.”

ASSUMED RISK

In this particular instance, the court determined that “decedent himself was the sole proximate cause of the accident.” In so doing, the court noted that “[t]he event at issue was not just a parade, but a carnival-type parade, where mass spectator revelry and dancing crowds are common and expected.” Under such circumstances, the court found that “the surging crowd and motorized vehicles were open and obvious conditions” which did not pose any unusual or concealed risks. Moreover, there was no evidence that any of the defendants had “unreasonably increased” the inherent risks associated with this event.

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Decedent, by breaching the parade barriers, entering the street and parade route, and reveling alongside the Burning Flames float, clearly engaged in a recreational activity, a carnival/parade celebration, and consented to those commonly appreciated risks which are inherent in and arise out of the nature of that recreational activity and flow from such participation, including those associated with the pedestrian and traffic congestion of the street on which it was being carried out.

In addition, the court determined that the 17-year-old decedent was “old enough to appreciate the dangers associated with walking and/or dancing too close to a large flatbed tractor trailer in that crowd, even if the tractor trailer was proceeding at a minimal rate of speed.”

According to the record, decedent walked or danced in close proximity to the flatbed trailer for approximately 15 minutes and several blocks prior to this accident and, if for some reason, he did not readily and immediately appreciate the obvious hazard, he clearly should have after being warned by one or more people nearby, including his "step-brother," Mr. Girard. By ignoring these warnings and continuing to revel in close proximity to the flatbed trailer truck and its tires, decedent voluntarily assumed the risk of being injured by an unconcealed, open and obvious dangerous condition of the site.

Indeed, once decedent voluntarily chose to participate in the up-close parade revelry, the duty, if any of WIADCA and the Burning Flames' to decedent was to exercise care to make the condition for decedent and other revelers as safe as they appeared to be. Since the risks of the activity were perfectly obvious and were or should have been fully comprehended by decedent, he must be deemed to have consented to them and the Burning Flames and WIADCA to have performed their duty.

As a result, the court held that decedent had assumed a risk readily discernible to a person of decedent's age and his own conduct was “the sole agent of his own accident and injuries.” Under such circumstances, the court found summary judgment dismissing the complaint as against the Burning Flames and WIADCA was appropriate.