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IT'S AFTER MIDNIGHT: DO YOU KNOW WHAT YOUR KIDS ARE UP TO?

In *Doe v. Messina*, No. 14-10-00419-CV (Tex. App – Houston [14th Dist.] Aug. 26, 2011, no pet. his.), the Court of Appeals affirmed the trial court's granting of appellees' No-Evidence Motion for Summary Judgment challenging each of Doe's claims for ordinary negligence, gross negligence, and premises liability against Messina.

Background

In 2005, Messina (and his wife) owned property on Lake Travis in Austin. The main house was located away from the lake. The smaller guest house was near the lake. His twin sons, Louis Jr. and Christopher, and Doe's brother, Nicholas, were in a rock band. In October 2005, the band performed a show in Austin to celebrate the eighteenth birthdays of Louis Jr. and Christopher. After the show, Doe, her brother, and Shawn Kervin, a nineteen year old male, went to the guest house where they drank beer and liquor and smoked marijuana. Kervin also took the illegal narcotic "ecstasy." After several hours of partying, Nicholas and his girlfriend left and spent the night at the main house. The rest of the group slept in the guest house. In the middle of the night, Doe was awakened by Kervin sexually assaulting her.

The legal basis of Doe's claims against appellees was that they were negligent by failing to supervise a group of teenagers whom (1) they expressly permitted to stay at the guest house and (2) they knew (or should have known) were consuming alcohol and drugs.

Ordinary Negligence Claim

Appellees argued that there was no evidence supporting the contention that their negligence, if any, proximately caused Doe's injuries. The Court of Appeals noted that to prevail on a cause of action for negligence, a plaintiff must establish that (1) the defendant owed her a legal duty, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's injuries. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288

S.W.3d 401, 404 (Tex. 2009). The court noted that the components of proximate cause are cause in fact and foreseeability. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Further, these elements cannot be established by mere conjecture, guess, or speculation. *Id.* It was also noted that foreseeability means the defendant, “as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others.” *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549-50 (Tex. 1985).

Doe argued that (1) Messina’s sons frequently stayed at the guest house and he did not have a practice of monitoring them during such stays, (2) Messina knew or should have known that the teenagers were consuming alcohol and drugs, (3) Messina testified he drank when he was underage, and (4) Messina agreed it would not shock him if his children, and others, were drinking alcohol while at the guest house.

Messina countered that he would really be disappointed if there was drug use out at the guest house. He had not been aware that his son had smoked marijuana at the guest house. He had no knowledge of any of his sons taking “ecstasy.”

Doe also noted that Messina (1) assured he would “be there” and (2) opined that a girl under eighteen years old should have adult supervision.

The Court of Appeals determined that Doe’s sexual assault was not a foreseeable consequence of appellees’ alleged failure to supervise a group of teenagers who were consuming alcohol. Specifically, the Court noted the following:

Doe presented no evidence that any of the teenagers, including Kervin, had ever personally committed or attempted to commit sexual assault;
Messina’s admission that a girl under eighteen-years old needs adult supervision is not evidence that supports an inference that sexual assault was foreseeable;
The presence of Doe’s eighteen year old brother further negates Doe’s contention that appellees should have foreseen their failure to supervise the teenagers would result in a sexual assault of Doe;
Although allowing the teenagers to consume alcohol without adult supervision might have had various foreseeable consequences (such as arguments, promiscuity, horseplay, etc.), the egregious, felonious crime of sexual assault was an *extraordinary* consequence; and
The sociological study presented by Doe was not convincing. This study showed that researchers found that “the most common rape-risk situation for both adult women and college women is... being taken advantage of by a sexual predator after the woman has become intoxicated voluntarily.” However, the findings did not suggest that sexual assault was an ordinary consequence of all unsupervised teenage drinking, particularly when the victim’s intoxication was not a factor in the assault.

Superseding Cause

The Court also determined that it was clear that Kervin's actions (the third-party criminal act) were a superseding cause of Doe's injury: (1) he committed this sexual assault; (2) this action subjected him to civil liability to Doe, as well as a felony indictment; and (3) Kervin, who was nineteen-years old, was highly culpable for committing the sexual assault.

Gross Negligence Claim

Appellees urged that a finding of ordinary negligence was a prerequisite to a finding of gross negligence. *Sonic Sys. Int'l, Inc. v. Croix*, 278 S.W.3d 377, 395 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The Court of Appeals agreed.

Premises Liability

The Court of Appeals also determined there was no evidence that a dangerous condition existed on the premises of which appellees had actual or constructive awareness.

Specifically, since it had already determined that a reasonably prudent person would not have foreseen that Doe would have been sexually assaulted if the teenagers were not supervised, the premises liability claim failed, as well.

WHAT DOES THIS MEAN FOR PARENTS OF TEENAGE CHILDREN?

This opinion provides a road map for parents to potentially avoid liability for failing to supervise their teenagers, and others, staying at their home, due to criminal activity and mishaps that may arise from alcohol consumption and drug use.

However, society may not agree with parents using the "head in the sand" approach to parenting. By eliminating teenagers' access to alcohol and drugs, parents may proactively reduce the foreseeable consequences such as arguments, promiscuity, horseplay, etc.; as well as, the more egregious (although arguably unforeseeable) crimes of sexual assault that often take place after a night of partying with alcohol and drugs.

Perhaps parents should focus more on being a role model than providing a "cool place" for teenagers to hang out at.



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