

April 16, 2013

Wabash College lawsuit raises questions about who polices fraternity hazing

Who is responsible for hazing? State Supreme Court to decide where responsibility of colleges, fraternities lies

By Tim Evans

tim.evans@indystar.com

A case before the Indiana Supreme Court this month could set the stage for the state's first jury trial examining the responsibility that colleges and fraternities have to protect students from hazing.

Before that can happen, though, the state's high court must decide a more basic question: Does the personal injury lawsuit filed by former Wabash College student Brian Yost even merit a trial?

Yost's broader case centers on whether Wabash or Phi Kappa Psi (known on campus as Phi Psi) had a duty to ensure his safety — specifically after a string of hazing and alcohol-related problems at the private school in Crawfordsville. More than a half-dozen incidents since 2000, including the deaths of two underage students who had been drinking, prompted sanctions against fraternities.

If the high court grants Yost his day in court, it will be the first case in Indiana to address civil liability in connection with hazing.

And should Yost prevail, the case could significantly expand the limited legal duty colleges and universities have to safeguard students.

"Institutions are going to need to understand that there could be greater consequences for their failure to more actively engage in the behavior of institutions that are on university-owned property," explained Andrew R. Klein, a professor at Indiana University Robert H. McKinney School of Law in Indianapolis.

Indiana courts traditionally have declined to hold colleges and universities accountable for protecting students from injuries on campus. It is a point attorneys for Wabash make in a brief filed with the Supreme Court.

"The broad, all-encompassing duty, if created (in Yost's case)," Wabash contends, "is such a dramatic change from existing Indiana law that if it is to be established, it is a matter for the General Assembly."

Wabash is not alone in struggling with Greek hazing issues, but two factors could differentiate Yost's case from others in which courts found schools did not have a broad duty to protect students, said Carmel personal injury attorney Stephen M. Wagner.

Unlike most fraternity and sorority houses on other Indiana campuses, which are owned by the organizations, Wabash owned the fraternity house where Yost was injured. The college and fraternity also were aware of past hazing and alcohol abuse, and had taken steps to monitor and discipline violators.

Wagner, who has lawsuits pending against Wabash in the deaths of students in 2007 and 2008, said the school's landlord status could form a stronger basis for liability. That's because Indiana law requires property owners to protect guests from "reasonably foreseeable" dangers. The knowledge of past incidents and the actions taken by Wabash and the fraternity to address them, he added, could bolster the argument that Yost's injuries were foreseeable.

‘Maintaining traditions’ encouraged

Yost’s three-year legal saga grew out of a night of horseplay at the Phi Psi house on Wabash’s 60-acre campus.

While legal questions abound — not the least of which is whether Yost was a hazing victim — there is general agreement about events leading to the severe brain injury he suffered Sept. 24, 2007.

Yost was living in the college-owned frat house and had received a pledge package that included, among other things, information on two rituals: “creeking” and “showering.” Pledges, according to court records, were encouraged to maintain those traditions.

After a Sunday night of partying at the Phi Psi house, Yost and several pledges decided to follow that advice and “creek” an upperclassman. The rite involved throwing a fraternity brother who becomes engaged or turns 21 into nearby Sugar Creek.

Emboldened by that successful dousing, the pledges returned to “creek” another member. But that effort failed and court records reveal a “hall brawl” erupted.

“Basically the entire house was wrestling,” is how Yost described the incident in court documents.

Sometime about 2 a.m., four Phi Psi members grabbed Yost and carried him toward a bathroom for a “showering.” Yost fought back.

“I didn’t care whether I got showered or not,” Yost is quoted in court records. “I wanted to show my ferocity to the brotherhood.”

As Yost struggled, another Phi Psi member placed the thrashing pledge in a chokehold. Yost lost consciousness. The other fraternity members panicked and dropped him, causing Yost’s head to slam against the bathroom floor.

It is not clear what happened after that, but the incident was not reported to police or school officials and Yost later withdrew from Wabash.

Could injuries have been foreseen?

In August 2009, nearly two years later, Yost filed his lawsuit against Wabash, the local fraternity, its national affiliate and the Phi Psi brother who choked him.

Wabash and the fraternity asked for the suit to be dismissed, arguing no factual questions exist for a jury to decide. Montgomery Superior Judge David A. Ault agreed, so Yost asked for a review by the Indiana Court of Appeals.

Attorneys for Wabash and the fraternity declined requests to comment, but in court documents they contend Yost’s injuries were not the result of hazing and could not have been foreseen.

Documents filed by Yost’s attorneys, who also declined to comment or make Yost available for an interview, paint a picture of ongoing hazing and other dangerous behavior at Wabash.

Yost argued those past issues prompted the school and fraternity to take “affirmative steps to monitor, to prohibit and potentially to punish exactly the kind of conduct that led to (his) injuries.” That proves his injury could reasonably have been foreseen, Yost contends, and created a duty to ensure his safety.

A three-judge appellate panel disagreed, issuing a split decision in October backing the trial court’s ruling.

“Simply put, Wabash was not the guarantor of Yost’s safety, and, short of placing a representative of the college on every floor of the fraternity on a round-the-clock basis, it is difficult to discern what Wabash could have done differently to protect him under these facts,” judge Terry A. Crone wrote in the majority opinion.

In the dissenting opinion, however, judge Nancy H. Vaidik found “there is an issue of fact concerning whether the events of that night constituted criminal hazing and whether they were reasonably foreseeable to Wabash.” The judge said she also saw an issue of whether “Phi Psi assumed a duty of care toward Yost.”

Despite two setbacks, Vaidik’s opinion provided a glimmer of hope to Yost and he asked the Supreme Court to review his case.

A question of liability

The inner workings of Greek life won’t be foreign to three of the five Supreme Court justices hearing the case.

Justices Mark Massa and Steven David were fraternity members as students at Indiana and Murray State universities, respectively, and Justice Loretta Rush was in a sorority at Purdue University. It’s unlikely, however, any of the justices were previously aware of “creeking” and “showering.”

In an order setting oral arguments in the case for Tuesday, Chief Justice Brent E. Dickson made it clear what the justices want: “The court is particularly interested in hearing arguments on the issues of liability pertaining to the college and to the local fraternity chapter.”

Courts in some other states, including Delaware and Kansas, have extended a broader duty of care under circumstances similar to Yost’s case, said Wagner, the Carmel-based attorney.

But first, Yost must convince the Supreme Court he deserves a trial.

If a majority of justices find the Montgomery County judge’s ruling was appropriate, the broader legal questions in Indiana relating to liability in hazing cases will remain unanswered.

Additional Facts

Past incidents at Wabash College

Court documents filed in the lawsuit by Phi Kappa Psi pledge Brian Yost, as well as another lawsuit involving a fraternity pledge who died in 2008 from alcohol poisoning at a homecoming party, detail a history of hazing and underage alcohol use at Wabash College.

• Early 2000s

Pledges at Delta Tau Delta were forced to box as part of the pledge process, and the fraternity was placed on probation.

Phi Gamma Delta was investigated for making pledges buy condoms for brothers, calling a Hispanic pledge racially insensitive names and forcing pledges to stand in a circle while masturbating into a carved pumpkin.

• 2003

A Sigma Chi pledge was hospitalized with alcohol poisoning after drinking at the fraternity. Wabash sanctioned the fraternity and several members.

• 2004

Theta Delta Chi was accused of icing pledges in the basement of their house. The fraternity was placed on probation.

Garbage was thrown on sleeping freshmen at Phi Kappa Psi (the same fraternity that Yost would join) by older members who had returned from a local bar. The dean “worked very closely with rising house leadership each year to try to prevent similar occurrences.”

• 2005

Another incident of upperclassmen throwing garbage on sleeping Phi Kappa Psi pledges was reported.

• 2006

A freshman at Phi Delta Theta asked to depledge after he was tied to a pole in front of the fraternity house. The dean told chapter members to immediately cease the ritual.

- **2007**

A video showed members of Delta Tau Delta striking each other with pledge paddles.

Freshman pledge Yost was injured when he was dropped on his head during a tussle at the Phi Kappa Psi house.

Freshman Patrick Michael Woehner, 19, died when he fell from the top of Goodrich Hall, an academic building that was closed at the time. Toxicology tests revealed he had been drinking.

- **2008**

Johnny Smith, a Delta Tau Delta pledge, died from alcohol poisoning after participating in a "Family Drink Night" in which pledges were required to consume alcohol with their pledge fathers. Wabash withdrew the fraternity's recognition.

Kappa Sigma was placed on probation by its international chapter after pictures showed underage pledges drinking. Some members were removed.

The parents of a Phi Kappa Psi pledge wrote a letter to the school alleging their son was forced to consume alcohol, bullied, beaten, berated into membership, made to sleep outside or in the basement and suffered a hand-shaped bruise across his back.

- **2010**

Tau Kappa Epsilon pledges were forced to stand outside in shorts and sing while older members poured water on them. The activity was observed by a dean, who immediately stopped the action and sanctioned the fraternity.

In Indiana, hazing is considered a criminal act. Here's how the law defines it: Forcing or requiring another person, with or without the consent of the other person, and as a requirement or condition of association with a group or organization, to perform an act that creates a substantial risk of bodily injury. Many colleges, universities and Greek organizations have even stricter rules, including the international chapter of Phi Kappa Psi. It extends the ban to "any action taken or situation created, intentionally, whether on or off fraternity premises, to produce mental or physical discomfort, embarrassment, harassment, or ridicule." A list of examples includes use of alcohol, paddling in any form, creation of excessive fatigue, physical or psychological shocks, wearing of public apparel which is conspicuous and not normally in good taste, engaging in public stunts and buffoonery, and morally degrading or humiliating games and activities.
