

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW**

ANN LACEY, Administratrix for the Estate	:	
of JOHN PAUL LACEY, Deceased	:	
Plaintiff	:	
	:	
vs.	:	
	:	
WIDENER UNIVERSITY, INC. a/k/a WIDENER	:	NO. 05-4579
COLLEGE	:	
PROVIDENCE ENTERPRISES, INC.,	:	
CAFÉ DRE, INC. d/b/a WALIO'S FROG POND CAFÉ	:	
DAVID EBERSOLE, Individually	:	
Defendants	:	

**BRIEF FOR AMICUS CURIAE
ASSOCIATION OF INDEPENDENT COLLEGES & UNIVERSITIES OF
PENNSYLVANIA IN SUPPORT OF DEFENDANTS WIDENER UNIVERSITY, INC.
AND PROVIDENCE ENTERPRISES, INC.**

**The National Center for Higher
Education Risk Management, Ltd.**
20 Callery Way
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I. INTEREST OF THE AMICI CURIAE

Amici is the Association of Independent Colleges and Universities of Pennsylvania (AICUP). The AICUP is a tax-exempt, non-profit 501(c)(3) Pennsylvania Corporation.

The AICUP was established in October 1995, through the affiliation of three existing educational organizations. The primary governance of AICUP rests with a Board of Directors, made up of 23 college and university presidents. The AICUP serves 84 two- and four-year independent, not-for-profit college and university members located across Pennsylvania.

The AICUP is the only statewide organization that acts exclusively for the common interests of private higher education within the Commonwealth. The AICUP serves, promotes and enhances private higher education in Pennsylvania, and exists to complement and support the work of campus leaders. As the voice of independent higher education within the state, the Association seeks to represent higher education issues and to inform the broader public about the colleges and universities that make up its membership. In short, the Association serves as a single point of contact for an entire sector.

The Association carries out its mission on behalf of its members by serving as a voice for public policy, a forum for advocacy for students and families, a provider of member services, a center for higher education research, a vehicle for fundraising, and a catalyst for partnerships and collaboration. The AICUP provides substantial benefit to the entire private higher education sector in Pennsylvania and to the almost 280,000 students who attend its institutions. Indeed, a vastly disproportionate percentage of students who go on to earn Ph.D.s earn their bachelor's degrees from smaller, private colleges and universities.

Through the years, AICUP has become a respected source for policy-makers interested in information about higher education in Pennsylvania. The trust between AICUP and the

Pennsylvania legislature facilitates an honest and open discussion of public policy allowing AICUP to play a considerable role in the future of higher education.

Additionally, AICUP is one of 36 state organizations affiliated with the Foundation of Independent Higher Education (FIHE), a national organization working to increase support of private higher education across the United States.

II. BACKGROUND

At 11:30 p.m. on May 3, 2003, John Paul Lacey, a junior student at Widener University, was shot and killed in the vicinity of an off-campus bar adjacent to a parking lot owned by the University. The death of a student, especially a senseless murder, is tragic for a college or university and the broader community. Today's universities invest heavily in providing comprehensive programs and services for students. They demonstrate this commitment to students not only through the delivery of education in the classroom, but also through auxiliary services and programs such as student housing, student activities, counseling services and campus safety to supplement the local municipal police force.

III. ARGUMENT

Widener University strives to provide a safe living and learning environment for its students, by sponsoring safety programs, providing security patrols to supplement the municipal police force, and adhering to all legally mandated and commonly accepted standards of facility safety throughout the campus. Although Widener University is committed to providing a safe campus for all students, staff and visitors, the University cannot be expected to ensure the safety of those individuals against unforeseen and random acts of crime, especially in areas subject to public use.

Defending unfounded legal challenges to its provision of campus safety requires the university to assume additional financial obligations for unanticipated risks and diverts both human resources and limited fiscal resources away from providing the important structures and services of the educational environment and learning community. If, despite all reasonable efforts, an institution is held liable for unforeseen and unanticipated violence by a third party, the nature of our campuses will unquestionably change. Allowing this particular case, and similar cases, to be tried before a jury will have an immediate negative impact as well as a tremendous and substantial long-term negative impact on the cost of providing an education at Pennsylvania institutions. Most particularly, private and independent colleges who do not have the qualified immunity, sovereignty and state insurance pools of state institutions will incur greatly increased and unnecessary costs for liability insurance and legal defense at the expense of the delivery of educational programs and services.

The AICUP represents all private and independent colleges in the Commonwealth of Pennsylvania, but is also committed to the value of all higher education to the state. The AICUP is greatly concerned about the impact of a ruling for plaintiff on this Motion for Summary Judgment at this point in this case. A ruling for the plaintiff would profoundly limit the ability of colleges and universities in the state to continue to provide quality higher education if burdened by increased costs to defend or insure against such inappropriate legal challenges.

A. Security measures were adequate and appropriate for the area

Widener University is dedicated to providing a safe learning environment. The University maintains a Campus Safety Department consisting of 57 employees. The Campus Safety Department, operated by the University, provides 24-hour per day, 7 day a week vehicle

and foot patrol and protection that supplements the City of Chester municipal police department. Primary policing jurisdiction over the campus rests with the municipality, including the parking lot at issue here and the surrounding community. The Campus Safety Department works in collaboration with and is in constant communication with the Police through 2-way radios. Additionally, the Campus Safety Department works closely with the Pennsylvania State Police and other law enforcement agencies.

The concept of negligence provides damages for conduct that falls below a standard of care that would be considered minimal under circumstances where a duty is owed. In the case of Widener University, it maintained a separate, well trained security force to supplement the local police and provide an expanded degree of protection and safety in and around the University community. Although a university is not the insurer of its student's safety, *Shivers v. University of Cincinnati* citing *Kleisch v. Cleveland State University*, Franklin App. No. 05AP-289, 2006-Ohio-1300, Widener University took extraordinary measures to provide the safest environment reasonably possible.

Since the Widener University campus is a part of the policing jurisdiction of the City of Chester Police Department, the University established a Campus Safety Department to work in cooperation with the City of Chester Police in order to create a standard of care that exceeded the minimum. In addition, the safety measures consist of foot patrols or patrolling in well marked campus safety vehicles by municipal police or Campus Safety Department officers. Each area on and immediately adjacent to campus was patrolled every 20 minutes, a standard that meets or exceeds the practices of comparable universities.

The parking lot area of the alleged assault, although owned and maintained by the University, was designed for use by both the university community and campus visitors when

attending an event on campus. The presence of individuals who may not have been Widener students or employees is common, and, in the absence of probable cause for immediate potential harm, the Campus Safety officers are constrained from removing individuals from the public areas of the campus unless those individuals are violating the law, or disrupting campus activities. In the situation at hand, the young men involved in the unanticipated violent crime were not displaying observable unlawful behavior prior to its occurrence. There was no apparent evidence that any of the youths were carrying a firearm. The mere presumption that they were not “typical Widener students” and they were from a racial minority did not provide a sufficient basis to challenge, question or remove them from the parking lot. In fact, using this type of criteria to remove individuals from campus could be challenged as a civil rights violation and would be poor practice from a public policy standpoint.

B. There was no foreseeability of harm

Based on campus crime statistics for the area, as well as a verbal report filed by a Campus Security Officer less than 20 minutes prior to the tragic violence, there was no information to suggest that Mr. Lacey would at that or any time be subject to the type of assault he suffered, by those who attacked him. In fact, although the general area has been characterized as a “high crime area”, there were no reported incidents that were substantially similar. This type of violent attack was unprecedented in this area. There are many court decisions holding that violent criminal attacks by third parties do not give rise to foreseeability absent a pattern of similar crimes.¹

¹ *Doyle v. Gould*, 2007 Mass. Super. LEXIS 234 (Ma. 2007) (citing that reports of burglaries in the area did not give rise to foreseeability of a student being murdered); *Bullock v. Temple University*, 929 A.2d 232 (Pa. Super. 2007); *Mullins v. Pine Manor*, 449 N.E. 2d 331 (Mass. 1983) stating that colleges must exercise reasonable care to prevent foreseeable injury to their students for the accidental, negligent or intentional acts of third parties.; *Feld v. Merriam*,

Widener University and members of the Widener community suffered greatly from the violent death of Mr. Lacey and worked to prevent such a senseless and unanticipated act. The violent act resulting in Mr. Lacey's death was as a result of unforeseen action by third parties, not by the University. Certainly Widener University would have taken additional extraordinary action if they had any type of actual or constructive knowledge of the imminent violent act of a third party. The university carefully employed every reasonable measure to provide security patrol in areas adjacent to the campus, in addition to the patrols provided by the municipal police. By law, the University had no duty to exercise any care until they knew or had reason to know that the acts of the third person were occurring, or were about to occur².

There was no activity in the area around the Frog Bar Café that created any type of foreseeability of this type of violent act. In addition there was no pattern of shootings or aggravated assaults in the area that would create a foreseeability of this type of act.³ The New York case of *Eiseman v. State*⁴ provides a useful analogy to the circumstances presented on the night of Mr. Lacey's murder and to the foreseeability of harm on the part of Widener University. This case arose out of a situation where an ex.-felon ("Campbell") with a history of drug abuse and criminal conduct unknown to the university was admitted to the university. When Campbell raped and murdered another student and the murdered student's family sued, the court held that it would be contrary to public policy to assume that Campbell presented an abnormal risk merely because he had spent time in prison, and the university had received no reports of unreasonable

485 A.2d 742 (Pa. 1984) in which the Pennsylvania Supreme Court recognized that unpredictable cases of violent acts of third parties can be expected anywhere, anytime, and has been a risk of life for a long time.

² Section 344 of the Restatement Second of Torts

³ Negligence law requires that the defendant must have foreseen the harm that ultimately befell the particular plaintiff under the facts presented. *Campo v. St. Luke's Hospital*, 755 A.2d 20, 24 (Pa. Super. 2000)

⁴ 518 N.Y.S.2d 608 (Ct. App. N.Y. 1987)

behavior on Campbell's part. It was not foreseeable to the university that Campbell posed the type of risk that occurred.

Following the Eiseman ruling, the Court of Appeals in Indiana, in Severson v. Board of Trustees of Purdue University⁵, determined that in assessing whether a criminal act of a third party is foreseeable, a substantial factor is the number, nature and location of prior similar incidents.⁶ In the 2005 case of Agnes Scott College, Inc. v. Clark,⁷ the court also looked at the history of similar incidents in the area. The court determined that the rape and kidnapping of a student from the college's parking lot by a third party was not a foreseeable act on the part of the College because prior to that incident there had been no reported incidents of kidnapping rape, or other violent crimes occurring in that parking lot.

Additionally, in 2006, the Court of Appeals of Ohio, Tenth Appellate District, in Shivers v. University of Cincinnati⁸, examined the foreseeability of criminal acts by third parties under a test of whether a reasonably prudent person would have anticipated a substantially similar type of injury by reviewing the totality of the circumstances. In this case, Jamila Shivers was raped in the communal bathroom in her residence hall by an unknown third party. The court stated that evidence demonstrating that numerous criminal activities occurred on campus was insufficient to demonstrate foreseeability of the rape.⁹ General knowledge of the potential for crime will not establish foreseeability. The court further stated that because criminal acts are largely unpredictable, the totality of the circumstances must be "somewhat overwhelming" in order to

⁵ Severson v. Board of Trustees of Purdue University, 777 N.E.2d 1181 (Ind. App. 2002)

⁶ Id. At 1200

⁷ 616 S.E.2d 468 (Ga. App. 2005)

⁸ Shivers v. University of Cincinnati, 2006-Ohio-5518 (Ohio App. 10th Dist. 2006)

⁹ id. at 11

create sufficient foreseeability to rise to a legal duty¹⁰ (citing to *Reitz v. May Co. Dept. Stores* (1990), 66, Ohio App. 3d 188, 192).

The young men gathered in the parking lot adjacent to Widener University were similar to the assailants in every one of the foregoing cases. The mere fact that three young men were congregating in a parking lot, were not displaying violent or threatening behavior, and were not obviously armed, would not suggest any type of intervention would be required. There was simply no foreseeability of the type of violent crime that was about to occur. There was no threat, no clue, no menacing behavior or harassing of passersby. For campus safety to approach, challenge and disperse small groups of individuals without precipitating dangerous behavior on the part of the individuals congregated, and in the absence of any history of similar violent acts in the area, would be both illegal and against public policy.

C. Lacey had responsibility to exercise care for his own safety

The Campus Safety Department works closely with the Office of Student Affairs and other university offices to ensure that safety policies and procedures are uniformly executed and conveyed in a clear and consistent fashion to students, faculty and staff. During summer orientation programs at Widener University, the Campus Safety Department conducts Safety Awareness and Crime Prevention programs. The theme of the programs is “Safety is a Shared Responsibility”, and through a series of programs they explain to all community members that they must always be aware of the nature of their surroundings, and should always take appropriate action to ensure their personal safety. Additionally, each October the University publishes a comprehensive annual report of campus crimes, crime statistics and safety and security practices.

¹⁰ id. at 7

At the time of his murder, Mr. Lacey lived in an off-campus apartment a block from the area in which he was shot, an area suggested to be a “high crime area”, and an area he knew well as a resident. Yet at 11:30 p.m. on the evening of his murder, Mr. Lacey voluntarily chose to walk alone the one block distance from his apartment to the Frog Bar Café to purchase beer, while talking on his cell phone. Having been a resident in the immediate area for over a year, Mr. Lacey was well aware of the nature of the community surrounding the Widener campus. Mr. Lacey’s behavior did not demonstrate that he felt that walking alone in this area late at night was an unreasonable risk or posed a danger. Certainly, as a 21 year old who lived and socialized in the area, Mr. Lacey was in a superior position to exercise ordinary care for his own safety, especially if he felt the potential for a criminal act was apparent.

In a landmark case from Pennsylvania, *Bradshaw v. Rawlings*¹¹, the United States Court of Appeals for the Third Circuit held that under Pennsylvania law, a university is not *in loco parentis*, and does not have a custodial relationship to its students. The court further stated that students are *adults* (emphasis in document), entitled to self-assertion in physical and mental activities.

In *Mullins v. Pine Manor College*¹², the college maintained high fences around the school with guard stations positioned around the perimeter. They required all students to live in the residence within this fortress. In doing so, the college took on additional responsibilities for the safety and security of its students. A Pine Manor student was abducted from her residence hall and sexually assaulted within the fortress of the campus by an unknown third party. The Massachusetts Supreme Court found against the College in this case, based on the fact that the injured student lacked both freedom and the ability to implement her own security measures.

¹¹ 612 F.2d 135 (3rd Cir. 1979), *cert denied*, 446 U.S. 909 (1980)

¹² *id.*

The college constrained the living circumstances and assured the campus community that they took full responsibility for the safety of the students.

The court held that colleges and universities must exercise reasonable care to prevent *foreseeable* injury to their students by accidental, negligent and intentional acts of third parties. When a college assumes the full responsibility for the living environment and the movement of its students on and around campus, as well as for their complete safety, a student would not be assumed to be able to act on his or her own behalf. That is clearly not the set of circumstances presented in the Lacey case. The courts apply the foreseeability standard in conjunction with the ability of the plaintiff to make informed decisions and engage in personal safety. In the situation at hand, Widener did not require Mr. Lacey to live on campus. Mr. Lacey voluntarily assumed a risk to live in the surrounding community and to venture out in his own neighborhood alone at night. That voluntary decision was not required by the university as a condition of his status as a student, and Mr. Lacey maintained a responsibility for his personal safety.

D. Widener University was not the proximate cause of Mr. Lacey's unforeseen violent attack.

Proximate cause relates to the scope of a defendant's responsibility in a negligence case. A defendant in a negligence case is only responsible for those harms that the defendant could have foreseen; the harm that would have resulted from the act in consideration. The attack on Mr. Lacey was inflicted by the unforeseeable actions of a third party. There was no causation between the conduct of Widener University and the murder of Mr. Lacey. In fact, there was no previous crime of the same nature, or activity in the area surrounding the Frog Bar Café that

could establish that the University could possibly know the potential for the violent attack on Mr. Lacey.

Widener University employed a Security Department that provided 24/7 foot and car patrol of the university and surrounding area. This security patrol was provided by the University as a supplement to the City of Chester police department, which provided police patrol and coverage of the university area. In *Colarossi v. University of Rochester*,¹³ a student sued the university, seeking to recover damages for injuries he sustained when he was shot while on the university's campus by a person who was not a student there. The student alleged that the university was negligent in failing to provide adequate security protection in the area of the campus where the incident occurred. The appellate court concluded that the state Supreme Court erred in denying the university's motion for summary judgment dismissing the complaint. The court held that any negligence on the part of the university was not a proximate cause of the student's injuries. The court stated that alleging the university could have prevented the attack by additional safety measures was "highly speculative and conclusory in nature".¹⁴ The court stated that "although it is conceivable that a greater security presence may have prevented the incident, conceivability is too slim a reed, standing alone, to support the conclusion that [defendant's] alleged negligence proximately resulted in [plaintiff's] injuries"¹⁵. In the case of the unforeseen attack on Mr. Lacey, both the campus Security Department and the local police department patrolled the area of the attack (roughly every 20 minutes), the adjoining parking lot was well lit, and there are no facts to support the allegation that failure of adequate security by the university was a proximate cause of the violent attack by third parties.

¹³ Supreme Ct. of N.Y., Appellate Div., 4th Dept., 2 A.D. 3d 1272, 2003

¹⁴ id. at 4

¹⁵ *Collarasi* citing *Ascher v. F. Garafolo Elec.*, 113 A.D. 2d 728 at 732, 493 N.Y.S. 2d 196

V. CONCLUSION

The AICUP urges the court to render a favorable ruling on Widener University's motion for summary judgment. The University commits substantial human and fiscal resources to create and maintain a safe environment for both students and invitees to the campus. Creating a safer environment would result in walls, guards and limited and controlled access—in essence a fortress or a prison. Even that would not guarantee safety, especially when many acts of violence on college campuses come from within the walls, such as at Virginia Tech. Widener University strives to be a vibrant learning environment where students and community members mutually share in the educational opportunities provided by the university. The Court in *Bash v. Clark University*¹⁶ in a holding addressing a university's duty of care to protect students from the consequences of their own choice to use drugs, stated, "The incursion upon a student's privacy and freedom that would be necessary to enable a university to monitor students during virtually every moment of their day and night to guard against risks...is unacceptable and would not be tolerated."¹⁷ An institution is only expected to engage in a reasonable effort to balance the privacy and freedom rights of students to pursue life as they choose with reasonable safety measures to create the most inviting, vibrant and studious environment. Mr. Lacey was an adult student living off campus and made an independent choice to walk at night in an area well known to him. There is no information to suggest an imminent probability of a violent, fatal attack against Mr. Lacey. The institution should not be held responsible for nor have to defend itself for the unforeseeable violence inflicted by a third party. A negative decision on the university's motion for summary judgment will not only affect Widener University, but also

¹⁶ *Bash v. Clark University*, Massachusetts Superior Court, No. 06-745A, 2003

¹⁷ *id.* at 4

have a dramatic negative impact on the nature of the educational environment for all colleges and universities in the Commonwealth of Pennsylvania.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Amicus Curiae Brief of the Association of the Independent Colleges and Universities of Pennsylvania has been mailed to all counsel of record listed below on this _____ day of May, 2009, and to the Honorable Judge George A. Pagano.

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