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IMPORTANT OPINIONS OF THE WEEK

Criminal — Sex offender

A defendant could be prosecuted in Massachusetts under the Sex Offender Registration and Notification Act for failing to update his registration after moving to New York, the 1st U.S. Circuit Court of Appeals holds.

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Education — CARES Act

A student's immigration status should not be taken into account in the distribution of funds under the Coronavirus Aid, Relief, and Economic Security Act, a U.S. District Court judge determines.

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Employment — Ministerial exception

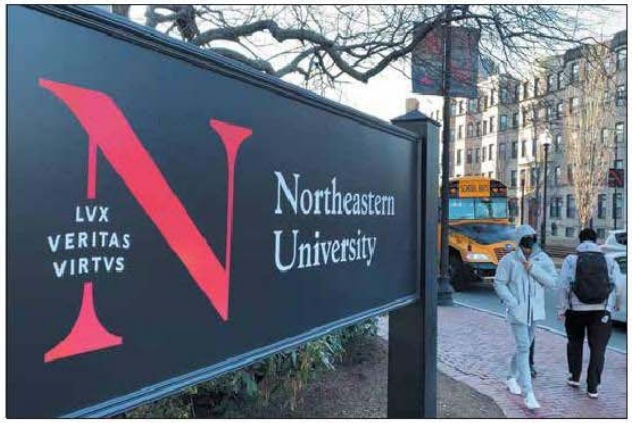
A plaintiff who served as the

SJC rules colleges must protect intoxicated students from harm

'Special relationship' creates duty of care

By Eric T. Berkman
Lawyers Weekly Correspondent

KOLPAN ITZKOWITZ
Co-counsel for plaintiff



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Attorneys say a recent Supreme Judicial Court decision significantly expands the obligation of colleges and universities to protect students from alcohol-related emergencies.

The plaintiff in the case, Morgan Helfman, alleged that, as a freshman at Northeastern University in 2013, she was sexually assaulted by a classmate after he walked her back from a party at a residence hall. In a negligence action against the school, Helfman alleged that resident

A Superior Court judge granted summary judgment for Northeastern, ruling that the university had no duty to protect the student under the circumstances.

The SJC affirmed, holding that the "mere presence of an intoxicated young woman in the company of an intoxicated young man as they returned to their shared residence hall" did not make the alleged assault reason-

IHEs, have no duty to protect students from the consequences of voluntary alcohol consumption. Instead, the SJC announced that a special relationship exists in which IHEs must take "reasonable measures" to protect students they know are in "imminent danger" and cannot seek help.

"Equipped with such knowledge, a college or university merely must act reasonably under the circumstances," Justice Barbara A. Lenk wrote for the

physical well-being, a reasonable response will include doing little or nothing at all, while in others, calling for medical or other forms of assistance might be warranted."

Plaintiff's counsel Mark F. Itzkowitz of Boston said he was disappointed with the result for his client but glad to see the court confirm the special relationship between students and universities.

"Lower courts had been chipping away at that relationship,"

alleged age- and gender-based harassment and discrimination, the Appeals Court rules.

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Zoning — Variance

A judge erred in concluding that the owners of a home in Gloucester needed a variance for their detached garage to exceed 12 feet in height, the Appeals Court decides.

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It's not easy being green

A documentary film about a war waged by the creator of "Pepe the Frog" brings unexpected "stardom" to a pair of Boston IP lawyers. In this week's Hearsay column.

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to take appropriate steps to protect her from harm.

easterns' argument that institutions of higher education, or

respecting a student's autonomy and the need to protect his or her

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1st Circuit revives suit to claw back hidden assets

'Ex' allegedly gifted money to alma mater

By Pat Murphy
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An ex-wife had standing under the Uniform Fraudulent Transfer Act to bring an action to recover millions of dollars in marital assets that her former spouse allegedly hid during divorce proceedings before gifting to his alma mater, the 1st U.S. Circuit Court of Appeals has determined.

The plaintiff, Janet Foisie, sued Worcester Polytechnic Institute in federal court in Massachusetts for violating Connecticut's UFTA and for common-law fraudulent conveyance. According to the plaintiff, Robert Foisie hid millions of dollars in assets during their divorce proceeding in Connecticut state court. Following the divorce and before his death in June 2018, Robert allegedly transferred the funds to defendant WPI.

In September 2019, U.S. District Court Judge Timothy S. Hillman granted the school's motion to dismiss, concluding that the plaintiff did not qualify as a "creditor"

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Attorneys' fees counted against procedural limit

Ruling helps fill void of appellate authority

By Kris Olson
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Statutory awards of attorneys' fees should be considered in determining whether the amount-in-controversy threshold to establish Superior Court jurisdiction has been met, a single justice of the Appeals Court has ruled in a decision with implications for claims brought under any of the state's dozens of fee-shifting statutes.

D'ARCY
Prevails for plaintiff

In the Wage Act case at issue, the plaintiff stood to recover no more than $17,000 in unpaid commissions and wages, Superior Court Judge Christopher K. Barry-Smith found. On that basis, he granted the defendants' motion to dismiss pursuant to G.L.c. 212, §3, for failure to satisfy the then-operative $25,000 procedural amount in the Superior Court.

"In the absence of appellate interpretation," Barry-Smith reasoned that attorneys' fees should be treated like multiple damages and ignored for the purposes of calculating whether the threshold had been met.

"Like statutes authorizing multiple damages, the statutory authorization of attorney's fees, which alters the so-called American rule, also serves to compel compliance with statutory standards and deter violations," Barry-Smith wrote.

But, sitting as a single justice to hear a final appeal under G.L. 212, §3(A), Appeals Court Judge Sookyoung Shin reversed.

Shin noted that the question had arisen in the 2014 case *Toro v. CSX Intermodal Terminals, Inc.*, which involved the inverse amount-in-controversy rule applicable in the District Court, G.L.c. 218, §19.

In *Toro*, Supreme Judicial Court Justice Margot Botsford, sitting as a single justice, adopted a "similar approach" to one taken by the 1st U.S. Circuit Court of Appeals in its 2001 decision, *Spielman v. Genzyme Corp.*

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MLW The full text of the ruling in *Stonier v. WAC Consulting, Inc., et al.* can be found at masslawyersweekly.com.

Colleges must protect intoxicated students from harm

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the physical layout of the university. It extends to the university in all its facets: people who work with students, resident advisors, people who come in contact with students, and fellow students."

The plaintiff's co-counsel, Kenneth I. Kolpan of Boston, said he was pleased the SJC did not accept Northeastern's attempt to "blame the victim."

"They were saying, 'She drank, so we're immune from suit,'" Kolpan said. "But the court was clear that this approach by universities in defending lawsuits is no longer acceptable."

Northeastern's attorney, Daryl J. Lapp of Boston, declined to comment.

The 46-page decision is *Helfman v. Northeastern University, et al.*, Lawyers Weekly No. 02-303-20. The full text of the ruling can be found at masslawyersweekly.com.

Alleged assault

On Oct. 31, 2013, Helfman and "A.G." — a fellow freshman who lived in her dorm — attended a Halloween party hosted by a sophomore who was a resident advisor in a different dormitory.

The two students allegedly consumed alcohol together in Helfman's dorm room beforehand and brought more alcohol with them to the party.

Helfman engaged in drinking games at the party, became intoxicated, and vomited repeatedly in the RA's bathroom. Two acquaintances of Helfman stayed with her and provided water and crackers to control her nausea.

Later, when Helfman refused her acquaintances' offer to walk her home, A.G., who was also intoxicated, volunteered to

Helfman v. Northeastern University, et al.

THE ISSUE Do universities have a duty to protect students from foreseeable harm associated with alcohol-related emergencies?

DECISION Yes (Supreme Judicial Court)

LAWYERS Mark F. Itzkowitz of Boston and Kenneth I. Kolpan, of Boston (plaintiff)
Daryl J. Lapp of Locke Lord, Boston; Katherine Guarino Baker of Nelson Mullins, Boston (defense)

an investigation and disciplinary proceeding that did not result in a finding that A.G. committed a sexual assault.

Meanwhile, Helfman brought a negligence claim in Superior Court against Northeastern and several administrators, with Judge Robert B. Gordon granting the university's motion for summary judgment.

Helfman appealed.

Special relationship

While acknowledging that requiring colleges to police all on-campus use of alcohol would be "inappropriate and unrealistic," the SJC rejected Northeastern's contention that it had a corresponding duty to take reasonable measures to protect them from alcohol-related harm if it has "actual knowledge" of conditions suggesting a student is in "imminent danger" and too intoxicated to seek help for him or herself.

Here, however, the duty did not apply, the SJC concluded.

"Considering all of the information that Northeastern had at its disposal, it was not reasonably foreseeable that the plaintiff was in peril at the time of the alleged assault," Lenk explained, noting that A.G. apparently had no history of sexual assaults. "Because Northeastern was not on notice that it would be required to step in and protect

"The higher education industry is on notice: It does have affirmative responsibilities to its students. The IHE immunity era is over."

— Jeffrey S. Beeler, Framingham

Erin K. Olson of Portland, Oregon, who co-authored an amicus brief for the National Center for Victims of Crime, said she hopes the ruling will lead to improved efforts by IHEs to prevent campus sexual assaults, most of which are alcohol-facilitated.

"The problem has long been known but never adequately addressed," Olson said.

Rebecca J. Roe of Seattle, who was also on the brief for the NCVC, said she was disappointed that Helfman's claim could not proceed but pleased with the court's statement that "the bystander era is coming to an end."

"Universities have been relying on the idea that these kids are 18 years old and on their own, despite the fact that everybody knows that's nonsense," Roe said. "I was happy to see an acknowledgement that you can't treat university students like an adult just because they've attained the age of 18. They really aren't full-scale adults."

Ruth O'Meara-Costello, a Boston attorney who handles campus discipline cases, said she was not surprised that the decision came out as it did on the negligence issue, but added that it "certainly leaves room" for courts to reach a different result when there is more evidence for a jury to find foreseeable harm.

Meanwhile, Boston attorney David A. Russcol pointed out that while the SJC focused on actual notice, it included a footnote regarding negligence or willful blindness.

"So there is an implicit warning for colleges that don't provide sufficient resources or incentives to address or report dangerous alcohol-related situations," Russcol said.

Alan D. Rose, a Boston lawyer who rep

home. During that walk, Helfman and A.G. kissed multiple times and stumbled to the ground.

After they reached the dorm and were admitted by the proctor monitoring the entrances, Helfman allegedly walked unsteadily toward the elevator.

The two students ended up in A.G.'s room, where he allegedly initiated sex. When she told her roommate about it the next day, she said that had she been sober, she would have stopped the encounter.

The roommate then informed their RA of the incident and the university undertook

tect a student while he or she is voluntarily intoxicated.

"[T]he 'bystander' era from which [the] 'no duty' decisions emerged ... appears to be drawing to a close," Lenk said, referring to a line of cases under which universities owed students no more of a duty than any other bystanders. "As we stated in [the 2018 *Nguyen v. Massachusetts Inst. of Tech*. decision], 'universities are clearly not bystanders or strangers in regards to their students.'"

Instead, Lenk said, a university has a special relationship with its students and

tion on Northeastern to act."

'On notice'

Jeffrey S. Beeler, a Framingham attorney who submitted an amicus brief in the case, said IHEs have been aware of the problem of alcohol-fueled sexual assaults on campus for years and have sought to wash their hands of the matter.

And while the duty articulated by the SJC in *Helfman* is a narrow one, he said, "the higher education industry is on notice: It does have affirmative responsibilities to its students. The IHE immunity era is over."

ment" in tort law, though he did not think it would prompt schools to change their approach to a significant degree.

That is due to the fact that, at least in Massachusetts, institutions already act responsibly, training their staff on what to do when they encounter an extremely intoxicated, helpless student.

"Institutions are currently striking the correct balance [between protecting students and respecting their autonomy]," Rose said. "Cases where an institution is found to have failed to meet its duty will be rare indeed." MLW

THIS WEEK'S DECISIONS

For full opinions, visit wopinions.com

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SUPERIOR COURT/ BUSINESS LITIGATION SESSION

Editor's note: The full text of these decisions can be found on Lawyers Weekly's website, masslawyersweekly.com.

Tort

SLAPP – Tortious interference

Where a defendant has asserted counterclaims alleging tortious interference with contractual relations and advantageous business relations, the counterclaims must be dismissed pursuant to the anti-SLAPP statute (G.L.c. 231, §59H) because they are based solely on the plaintiff's actions in filing his complaint and suing the defendants.

"Thomas J. Crotty has been in a protracted disputed with Continuum Energy Technologies ('CET') and its principal John Preston. After they settled one lawsuit against a company in which Crotty was a lead investor, CET sued Crotty for alleged fraud in negotiating that settlement. Judge Sanders dismissed CET's fraud claims and then sanctioned CET $100,000, after finding that CET and Preston knew their claims had no legal or factual basis yet brought them 'in an effort to gain some unfair advantage.'

"Crotty has now sued CET and Preston, alleging that in the prior fraud case they engaged in malicious prosecution, abuse of process, and civil conspiracy. Crotty also alleges that several investors in CET, including Prof. Michael Porter, knowingly participated in and are jointly liable for the purported conspiracy.

"CET and Preston assert counterclaims. They contend that certain factual allegations in Crotty's complaint constitute tortious interference with advantageous business relations, and that Crotty's conspiracy claim against CET investors constitutes tortious interference with contractual relations. …

"Mr. Crotty is entitled to have the counterclaims against him dismissed under the so-called 'anti-SLAPP' statute. This law applies to and may bar civil claims that are based on a party's 'exercise of its right of petition under the constitution of the United States or of the commonwealth.' ... 'The acronym 'SLAPP' stands for strategic lawsuit against public participation.' *Gillette Co. v. Provost*, 91 Mass. App. Ct. 133, 134 n.2 (2017).

"The counterclaims implicate the anti-SLAPP statute because they are based solely on Crotty's actions in filing his complaint and suing the Defendants. 'Commencement of litigation is quintessential petitioning activity' that is protected by the anti-SLAPP statute. …

"Preston and CET have not shown that Crotty's petitioning activity lacks factual support or any arguable legal basis. …

"Even if the counterclaims by CET and Preston were not subject to dismissal under the anti-SLAPP statute, the Court would nonetheless have to dismiss those counterclaims under Rule 12(b)(6) because they do not state any claim upon