

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-050660

11/09/2006

HONORABLE ROBERT C. HOUSER

CLERK OF THE COURT
R. Tomlinson
Deputy

B LEE FALKNER

DON P CRAMPTON

v.

ARIZONA STATE UNIVERSITY, et al.

MICHAEL G GAUGHAN
MICHAEL L GREEN
JEFFREY T PYBURN

RULING

This matter was taken under advisement following a hearing held on the Arizona Board of Regents' Motion to Dismiss, the Motion to Dismiss by Coach Dirk Koetter and Gene Smith's Motion to Dismiss/Motion for Summary Judgment. The Court has considered the memoranda filed by the parties in support of and opposition to the Motions, the arguments of counsel and the relevant law.

This action arises out of the tragic death of Plaintiff's son, Brandon Falkner. The Complaint alleges that on March 26, 2005, Brandon was shot and killed without provocation or reason by a member of the Arizona State University ("ASU") men's varsity football team, Loren Wade. The shooting occurred at or near a night club located in Scottsdale, Arizona where Brandon was socializing with friends and acquaintances. The Complaint seeks to hold Defendants liable for Brandon's death.

The Complaint alleges that due to his status as a scholarship member of the ASU varsity football team and his perceived talent as a running back, Wade enjoyed a special relationship with the ASU coaching staff and in particular Defendant Dirk Koetter, the head coach. The Complaint further alleges that Defendant Gene Smith, as Director of Athletics for the University

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at the time of the incident, had overall responsibility for the University's athletic program.¹ According to the Complaint, both Smith and Koetter knew or should have known of Wade's violent tendencies and his demonstrated disregard for the rules and regulations promulgated by the coaching staff and the University. As a result of his special relationship with Wade, the Complaint alleges that Koetter owed a duty to innocent members of the public to control Wade's known violent tendencies and that defendants breached this duty by negligently failing to protect the public from Wade, which ultimately resulted in Brandon's death.

Defendants have moved to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Ariz. R. Civ. P. 12(b)(6). Defendants contend that Koetter owed no legally cognizable duty to Brandon Falkner. In addition, Defendant Koetter has moved to dismiss the Complaint on the grounds that Plaintiff failed to timely serve a notice of claim as required A.R.S. § 12-821.01(A). Defendant Smith has moved separately for summary judgment on this ground. Defendant Koetter has also moved to dismiss the Complaint on the grounds that Plaintiff failed to properly serve his notice of claim in accordance with the Arizona Rules of Civil Procedure. Each Defendant has joined in the other Defendants' Motions.

Dismissing a complaint for failure to state a viable claim is not favored under Arizona law; the court will not grant such a motion unless it is "certain that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claim stated." *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 586 (App. 1981). "The question is whether enough is stated which would entitle the plaintiff to relief upon some theory to be developed at trial. The purpose of the rule is to avoid technicalities and give the other party notice of the basis for the claim and its general nature." *Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 106-107 (1975). In considering the motion, the court will assume the truth of all allegations contained in the complaint. *Bloxham v. Glock, Inc.*, 203 Ariz. 271, 273 (App. 2003).

To establish a claim for negligence, a party must prove a duty owed by the defendant to the plaintiff, a breach of that duty, proximate cause and damages. *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983); *Gipson v. Kasey*, 212 Ariz. 235, ¶ 11 (App. 2006). Defendants contend that there is no duty on the part of university coaches or administrators to control the off-campus criminal conduct of adult students in order to prevent harm to others. Plaintiff concedes as much. See Plaintiff's Response, p. 10. However, Plaintiff urges the court to find a duty on the part of the ASU Athletic Department because, Plaintiff contends, there is a greater degree of control exercised over student-athletes, particularly members of the men's football team, than the general student population. *Id.* For the reasons that follow, the court finds that there was no duty on the part of Defendants to control the conduct of Loren Wade.

¹ The Arizona State Board of Regents is also named as a defendant. There is no allegation that the Board of Regents itself acted negligently. However, Defendant Board of Regents concedes it is liable for the conduct of ASU officials and employees occurring within the course and scope of their employment by the University.

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“‘[D]uty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; in negligence cases, the duty [if it exists] is always the same-to conform to the legal standard of reasonable conduct in light of the apparent risk.” *Gipson*, 212 Ariz. at ¶ 13, quoting *Coburn v. City of Tucson*, 143 Ariz. 50, 52 (1984). In the absence of a duty of care owed to the plaintiff, there can be no liability for the plaintiff’s injury even if the defendant acted negligently. *Gipson*, 212 Ariz. at ¶ 13; *Wertheim v. Pima County*, 211 Ariz. 422, 424 (App. 2005); *Riddle v. Arizona Oncology Services, Inc.*, 186 Ariz. 464, 466 (App. 1996); *Bogue v. Better-Bilt Aluminum Co.*, 179 Ariz. 22, 34 (App. 1994).

The determination of whether a duty exists in a particular case usually presents a question of law for the court. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354 (1985); *Gipson*, 212 Ariz. at ¶ 12; *Collette v. Tolleson Unified School District No. 214*, 203 Ariz. 359, 362 (App. 2002); *Mack v. McDonnell Douglas Helicopter Co.*, 170 Ariz. 627, 629 (App. 1994); *Bogue*, 179 Ariz. at 34; *Newman v. Maricopa County*, 167 Ariz. 501, 503 (App. 1991). In making this determination, the Arizona Supreme Court has framed the question as follows: “[W]hether the relationship of the parties was such that the defendant was under an obligation to use some care to avoid or prevent injury to the plaintiff.” *Markowitz*, 146 Ariz. at 356.² In the final analysis, concluding that the relationship between the parties gives rise to a legally recognized duty is “an expression of the sum total of those policy considerations that lead the law to grant protection to a particular plaintiff from a particular defendant.” *Collette*, 203 Ariz. at 362.

There is no common law duty to control the conduct of third parties to prevent injury to another person. *Id.* at 363; *Tamsen v. Weber*, 166 Ariz. 364, 367 (App. 1991). Knowledge of a risk of harm to another and the ability to take steps to reduce or eliminate that risk do not standing alone impose a duty to act. *Collette*, 203 Ariz. at 363; *Riddle*, 186 Ariz. at 466-67. However, there is an exception to the rule of non-liability where a special relationship exists between the defendant and the third person. That special relationship creates a duty on the part of the defendant to control the other party’s conduct. *Martinez v. Woodmar IV Condominium Homeowners Ass’n*, 189 Ariz. 206, 207-08 (1997); *Collette*, 203 Ariz. at 363; *Bloxham*, 203 Ariz. at 274; *Davis v. Mangelsdorf*, 138 Ariz. 207, 208 (App. 1983); RESTATEMENT (SECOND) TORTS § 315(a) (1965).³

² In *Gipson*, the court of appeals framed the issue somewhat more expansively. “Our recognition of a duty is based on the totality of the circumstances as reflected in the following factors: (1) the relationship that existed between Kasey and Followill, (2) the foreseeability of harm to a foreseeable victim as a result of Kasey giving eight pills to Watters, and (3) the presence of statutes making it unlawful to furnish one’s prescription drugs to another person not covered by the prescription.” *Id.* at ¶15. Nevertheless, the linchpin of the analysis remains the relation of the parties.

³ A duty to control another party’s conduct also arises where there is a special relationship between the defendant and the plaintiff giving the plaintiff a right of protection. *Bloxham*, 203 Ariz. at 274; RESTATEMENT (SECOND) TORTS § 315(b) (1965). In this case, Plaintiff does not claim that any special relationship existed between Brandon

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The special relationships that give rise to a duty to control a third party's conduct are set forth in the RESTATEMENT (SECOND) TORTS §§ 316-319 (1965). *Fedie v. Travelodge Int'l, Inc.*, 162 Ariz. 263, 265 (App. 1989); *Davis*, 138 Ariz. at 208-209. Those special relationships are usually categorized as parent-child,⁴ master-servant, possessor of land-licensee or guardian-ward. *Fedie*, 162 Ariz. at 265. None of these specific relationships apply to the relationship between an adult student and a university or its coaching staff.

Plaintiff nevertheless contends that section 319 of the RESTATEMENT forms a basis for the court to impose a duty on Defendants in this case. Section 319 provides that: "One who *takes charge* of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." (Emphasis added). However, the phrase "takes charge" as used in section 319 carries with it the implication that the defendant has physical custody of, or legal control over, the third person. *Compare, e.g., Tamsen*, 166 Ariz. at 367-68 (psychiatrist who renders care to involuntarily committed mental patient with known or reasonably

and the Defendants that would give rise to a duty to protect Brandon from Wade's actions. *Compare, e.g., Jesik v. Maricopa County Community College District*, 125 Ariz. 543 (1980)(duty of care owed to student-invitee shot and killed on campus while registering for class); *Hill v. Safford Unified School District*, 191 Ariz. 110 (App. 1997)(teacher-student relationship is a special relation that creates duty to take reasonable precautions for high school student's safety although duty not breached where fatal shooting by another student occurred away from school grounds); *Delbridge v. Maricopa County Community College District*, 182 Ariz. 55 (App. 1995)(community college owed duty to student to protect student against unreasonable risk of injury during class where community college had primary control over classroom, course curriculum and instructor); *Schieszler v. Ferum College*, 236 F.Supp.2d 602 (W.D.Va. 2002)(special relationship could exist between university and resident student with emotional problems giving rise to duty to protect student from danger of self-inflicted injury); *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3rd Cir. 1993)(college owed duty of care to student based upon special relationship between college and student in his capacity as an athlete participating in school-sponsored activity for which he had been recruited).

⁴ The concept that a college or university stands *in loco parentis* to its students is anachronistic. *Niles v. Board of Regents*, 473 S.E.2d 173, 175 (Ga.App. 1996)(college administrators do not stand *in loco parentis* to adult college students). Almost thirty years ago, the court in *Bradshaw v. Rawlings*, 612 F.2d 135, 139-140 (3rd Cir. 1979) concluded that the *in loco parentis* doctrine is ill-suited to the realities of the contemporary university environment: "Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. . .College students today are no longer minors; they are adults in almost every phase of community life. . .There was a time when college administrators and faculties assumed a role of *in loco parentis*. . .A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave students certain rights of protection by the college. . .At one time, exercising their rights and duties *In loco parentis*, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. . .Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and the institution of higher learning are much different today than they were in the past." The *Bradshaw* court's observations are no less pertinent today in determining whether to impose a duty on a university to control the conduct of its adult students.

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discernable dangerous propensities owes duty of care to victim of patient under section 319; doctor was “in charge of” [patient’s] freedom of movement at the Arizona State Hospital”) *with Bruce v. Chas Roberts Air Conditioning*, 166 Ariz. 221, 228 (App. 1990)(employer had no duty under section 319 to protect public against employee’s operation of vehicle while intoxicated where “there is no evidence that the employer or any of its supervisors took charge of or otherwise exercised control over the employee”). The cases relied upon by Plaintiff for reading section 319 to cover the relationship between a student-athlete and a university’s coaching staff are inapposite. Those cases all involved a degree of control over the third party that is absent in the circumstances alleged in the Complaint. See *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 267 (1977)(duty owed to members of public when Board releases prisoner on parole with a history of violent and dangerous conduct towards others); *Karbel v. Francis*, 709 P.2d 190, 193 (N.M.App. 1985)(campus security guards stopped and then undertook to remove intoxicated driver from campus).

Unlike the cases cited by Plaintiff, Defendants here could not physically restrain Wade to prevent him from leaving the campus. At most, Defendants could suspend, expel or otherwise discipline Wade. However, such disciplinary measures are not control within the contemplation of section 319 or any case finding the existence of a special relationship. As stated by the court in *Collette*, 203 Ariz. at 364, “[t]he ability to impose discipline after the fact is significantly different from the power to control a student’s conduct before the fact.” The court went on to state that even in the case of a minor there are practical limits to control and thus the rationale for imposing a duty in the first instance is absent: “This court has recognized, in another context involving the control of the conduct of a minor, the futility of imposing a duty when there is no concomitant power to discharge it.” *Id.* The absence of a rationale for imposing a duty in the case of an adult student is, if anything, more pronounced. Defendants’ power to discipline Wade or to require further counseling, as suggested by Plaintiff, does not amount to the power to control him for purposes of finding a special relationship.

Plaintiff further argues that Illustration No. 1 following section 319 is instructive on the application of that section here. Illustration No. 1 gives two examples of circumstances where section 319 would support the imposition of a duty. Both hypotheticals involve persons with contagious diseases who are permitted either to leave or to escape from a health care facility through the negligence of the staff; thereafter, the patients communicate the diseases to third persons. First, a university is not an institution charged with safeguarding the health and safety of the general public. Its primary mission is education. Second, the custodial arrangement contemplated by section 319 does not embrace the degree of control which can be reasonably expected by a university over its students, including its student-athletes. Based on the hypotheticals, the ‘custody’ envisioned by section 319 finds application in situations involving close physical control such as occurs in hospital settings. Unlike a hospital, a university lacks the means to closely monitor its students on a twenty-four hour basis. Finally, unlike the

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hypothetical situations in Illustration No. 1, there is no allegation that Wade was so dangerous that he would be likely to cause injury to anyone with whom he came in contact. Accordingly, the Illustration does not support Plaintiff's contention that section 319 is the appropriate measure of the Defendants' duty in this case.

Apart from section 319, Plaintiff cites several cases as supporting the imposition of a duty here. *Hamman v. County of Maricopa*, 161 Ariz. 58 (1989), cited by Plaintiff, does not lead to the conclusion that Defendants owed a duty to protect the public from Wade's conduct. *Hamman* held that the relation between a psychiatrist and a patient was a special relationship for purposes of RESTATEMENT § 315 imposing a duty on the psychiatrist to protect third persons who are within the reasonably foreseeable zone of danger from the potentially violent conduct the psychiatrist's patient. See also *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976)(while psychotherapist employed by university hospital owed duty to third party, campus police did not have special relationship imposing duty to warn decedent or other individuals of risk posed by patient). Wade was not Defendants' patient and Defendants are not alleged to possess any special expertise in identifying and dealing with potentially violent individuals. The rationale for imposing an affirmative duty to protect a third party based upon a doctor-patient relationship does not translate to the university environment where untrained administrators, instructors and coaches would be required to constantly assess whether any of the thousands of students enrolled in the university present behavioral risks.

Plaintiff's reliance on *Ontivaros v. Borak*, 136 Ariz. at 500 is likewise misplaced. In contending that the court's rationale for recognizing a duty on the part of a supplier of liquor to take affirmative steps to control its patrons' conduct is applicable to the University's staff, Plaintiff relies on the following language in the opinion: "[T]he person who would put into the hands of an obviously demented individual a firearm with which he shot an innocent third person would be amenable in damages to that person for unlawful negligence." *Id.* at 509. In this case, there is no allegation that Defendants supplied Wade with the instrumentality used to kill Brandon. Plaintiff nevertheless argues that recruiting Wade, permitting him to remain at ASU knowing he was prone to violence and failing to prevent him from having possession of a firearm are the equivalent of arming a dangerous individual. See Plaintiff's Response, p. 18. Plaintiff's argument stretches *Borak* well beyond the language of the opinion or the facts of the case. The asserted rationale of *Borak* simply has no application in determining whether a duty should be recognized here.

The courts have recognized the impossible burden that would be imposed on educational institutions if the law were to subject schools to liability for the conduct of their students when

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those students are engaged in private activities away from school premises.⁵ In *Collette*, the court emphasized the pragmatic considerations in stating: “As a practical matter, we see no benefit in imposing a duty upon a school district concerning the conduct of students over which it has no control.” 203 Ariz. at 364. The court further observed that “appellants’ argument proposes an unreasonable duty on schools with potentially broad ramifications.” *Id.* Such is also the case with the duty that Plaintiff asks this court to impose on Defendants. The duty would encompass a broad range of off-campus conduct by thousands of adult students when those students are not engaged in school activities. The task is unmanageable and the scope of liability is unlimited. As noted in *Thompson v. Ange*, 443 N.Y.S.2d 918 (1981), “[i]t would be extending the legal consequences of wrongs beyond a controllable degree” to hold that schools are potentially liable for students’ off-campus conduct. Contrary to Plaintiff’s contention, there is no cogent reason for carving out the men’s football program for special treatment while exempting other university sports, activities and programs from a duty to control student conduct.

To impose a duty in this case would have the effect of making the State’s colleges and universities insurers against the risks associated with the conduct of their students whenever the students are away from the campus for private reasons. “We do not understand the law to be that one owes a duty of reasonable care at all times to all people under all circumstances.” *Hafner v. Beck*, 185 Ariz. 389, 391 (App. 1995). This court can discern no justification in law or policy for the adoption of a rule establishing such open-ended liability.

⁵ The courts in this and other states generally have not permitted claims against schools, colleges and universities for injuries to third parties caused by students or for injuries to the students themselves when sustained off campus. See, e.g., *Collette*, 203 Ariz. at 359(no duty to protect third party from risk of injury by student in off-campus accident); *Hill*, 191 Ariz. at 110 (no liability on part of school district where student shot and killed by another student away from school premises) ; *Tollenaar v. Chino Valley School District*, 190 Ariz. 179 (App. 1997)(school district not liable for death of high school student killed in off-campus car accident); *Rogers v. Retrum*, 170 Ariz. 399 (App. 1991)(same); *Albano v. Colby College*, 822 F.Supp. 840 (D.Maine 1993)(college coach owed no duty to prevent injury to adult student while on school-sponsored trip); *Hartman v. Bethany College*, 778 F.Supp. 286 (N.D.W. Va. 1991)(college had no *in loco parentis* relationship with student and owed no duty to supervise student’s off-campus activities to prevent injury caused by third party); *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003)(under Iowa law, college had no special relationship creating duty to protect third party from injuries caused by criminal acts of students); *Webb v. University of Utah*, 125 P.3d 906 (Utah 2005)(university instructor did not have requisite control over student to create special relationship giving rise to duty of care where student was off campus at time of incident); *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986)(university had no special relationship with student so as to impose duty on university to protect student from injury while on university-sponsored field trip); *Bradshaw*, 612 F.2d at 135(no special relationship existed imposing on college duty to control conduct of student operating motor vehicle off campus after class picnic); *Thompson v. Ange*, 443 N.Y.S.2d 918 (1981)(school owed no duty to protect public from student operating vehicle off school grounds during school hours while traveling to vocational training center).

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In summary, the court concludes that no special relationship existed between Defendants and Wade imposing a duty on Defendants to control Wade's off-campus conduct.⁶ In the absence of a duty, Defendants cannot be liable for negligence in connection with Brandon's death.

Because the court has found Defendants' argument that they owed no legally cognizable duty to Brandon to be dispositive, there is no need for the court to reach the alternative grounds for dismissal advanced by Defendants Koetter and Smith under A.R.S. § 12-821.01(A).

Plaintiff has not requested leave to amend the Complaint. Moreover, the court is unable to identify any amendment that would cure the deficiency in the claim. See, e.g., *Tarasoff*, 551 P.2d at 349 (amendment of complaint could not establish duty on part of campus police). Accordingly, dismissal is without leave to amend.

Now, therefore,

IT IS ORDERED granting the Defendants' Motions to Dismiss the Complaint for failure to state a claim upon which relief can be granted.

⁶ There is an additional reason for dismissing Plaintiff's claims against Defendant Smith. Plaintiff does not allege that Smith had a special relationship with Wade. Instead, Plaintiff seems to argue that Smith is deemed to have a special relationship with Wade based upon the special relationship that Defendant Koetter had with Wade. Plaintiff has cited no case supporting the proposition that an individual can be held to owe a duty to the plaintiff on the basis of a special relationship between another defendant and the third party causing the plaintiff's injury. Moreover, the court is unable to divine any justification for imputing a special relationship between Smith and Wade.