

STATEMENT OF FACTS

In the late evening hours of August 27, 1996 twenty-one year old Defendant James Moore invited into the home where he lived with his parents two adult male friends from his neighborhood, Defendant Jason Stoeckel and Defendant Bryan Bosland, both age nineteen. Accompanying Defendants Jason Stoeckel and Bryan Bosland to the Moore home that night were two thirteen year old girls, Nicole Kelly and Plaintiff N.N. Plaintiff N.N. was visibly intoxicated when she arrived at the Moore home and was physically supported by two people because she could not walk on her own.

An adult female was also present in the Moore home when Plaintiff and the others came to the house. Soon after Plaintiff, Defendants Jason Stoeckel and Bryan Bosland, and Nicole Kelly arrived at the Moore home, the adult female announced to all that she was going to bed. The adult female then ascended the stairs to another floor of the Moore residence.

At the Moore house Defendant James Moore and his guests conversed with each other on the outside patio and in the basement recreation room. Plaintiff told Defendant James Moore that she was thirteen years old. She and Nicole Kelly told Defendant James Moore where they lived. Plaintiff vomited on the patio several times in front of Defendant James Moore and the other guests. While Defendant James Moore and the four guests were on the patio, police cars cruised up and down the street where the Moore house is located.

At some point in the evening Plaintiff passed out on the couch in the Moore basement recreation room. Defendant James Moore went to bed and left the two couples, Plaintiff and Defendant Bryan Bosland, and Nicole Kelly and Defendant Jason Stoeckels, in the lower level of the Moore house for the rest of the night.

In the early morning hours of August 28, 1996 nineteen year old Defendant Bryan Bosland sexually penetrated the thirteen year old Plaintiff. The sexual act was not consensual. Plaintiff told Defendant Bryan Bosland that she did not want to have sex with him and she cried during the sexual contact. Defendant Bryan Bosland was indicted on two counts of sexual contact with a minor between the ages of thirteen and sixteen and one count of impairing the

morals of a child under the age of sixteen. Defendant Bryan Bosland plead guilty to the charge of sexual assault of a child of at least thirteen but less than sixteen years old, with the defendant being at least four years older than the victim, which is a crime of the second degree.

Plaintiff, through her mother, filed this lawsuit against Defendant Bryan Bosland for assault and battery. The law suit also claims negligence against Defendants Bryan Bosland, Jason Stoeckel, Eric Stoeckel, Jacqueline Stoeckel, James Moore, Jimmy D. Moore, and Virginia Moore.

RESPONDING STATEMENT TO

DEFENDANTS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS

In accordance with R. 4:46-2(b), the following constitutes Plaintiff's responding statement to Defendants James Moore, Jimmy Moore and Virginia Moore's statement of uncontroverted material facts in support of their motion for summary judgment.

1. Plaintiff admits.
2. Plaintiff admits.
3. Plaintiff disputes. On the date of the incident, Defendant Bryan Bosland was nineteen and a half years old, not eighteen. See Exhibit A at 3.

Additionally, on the date of the incident, Plaintiff was thirteen years old, between the seventh and eighth grades. See Exhibit B at 15; Exhibit C at 1. Defendant Bryan Bosland knew Plaintiff and her companion Nicole Kelly were thirteen. See Exhibit B at 15; Exhibit C at 9-10; Exhibit D at 22. Defendant James Moore also knew Plaintiff and Nicole Kelly were thirteen. See Exhibit B at 93-94.

4. Plaintiff admits.
5. Plaintiff does not have enough information to dispute this. There was, on the night in question, an adult woman in the Moore home. See Exhibit B at 43-45.
6. Plaintiff admits.
7. Plaintiff admits that Defendant James Moore did not initiate the invitation of herself, Nicole Kelly, and Defendants Jason Stoeckel and Bryan Bosland to the Moore home in the late hours of August 27, 1996. Rather, Defendant Bryan Bosland asked Defendant James Moore if he, along with Defendant Jason Stoeckel, Plaintiff, and Nicole Kelly could come in to Defendant James Moore's home, and Defendant James Moore invited them all in. See Exhibit D at 12; Exhibit C at 11; Exhibit H at 3.
8. Plaintiff admits.
9. Plaintiff admits.
10. Plaintiff admits.

11. Plaintiff admits.
12. Plaintiff admits.
13. Plaintiff admits.
14. Plaintiff admits.
15. Plaintiff admits.
16. Plaintiff disputes. Defendant Jason Stoeckel stated in a police report dated September 10, 1996 that Defendant Bryan Bosland was kissing Plaintiff in the presence of Defendant James Moore. See Exhibit H at 6.
17. Plaintiff disputes. Plaintiff cried and sobbed during the sexual assault. See Exhibit B at 61-62. While Plaintiff answered in her deposition, Exhibit B at 62, that “there were no noises that would have made Mr. Moore wake up,” Plaintiff cannot know for sure if that was indeed true. Plaintiff’s crying and sobbing sounds could have been enough to awaken Defendant James Moore.

ARGUMENT

POINT I

DEFENDANT JAMES MOORE IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT.

When considering motions for summary judgment, courts must analyze the evidential materials presented “in the light most favorable to the non-moving party[.]” See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). A court will grant summary judgment if:

the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

See id. at 528-29, citing Rule 4:46-2. See also Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125, 135 (1986). Hence, if there is a genuine issue of material fact, the court will not grant a summary judgment. See Brill, supra, 142 N.J. at 530.

In the case now before the court, there is a genuine issue of material fact. Defendant James Moore owed a duty of care to Plaintiff, a social guest, to exercise the foresight, prudence and caution that a reasonably prudent person would exercise when an intoxicated, ill, thirteen year old girl is invited into his home along with young adult male guests. Defendant James Moore breached that duty, and his breach, which constituted negligence, was a proximate cause of Plaintiff’s harm.

POINT II

DEFENDANT JAMES MOORE OWED A DUTY OF CARE TO PLAINTIFF AND HE BREACHED IT.

Negligence is conduct that “falls below the standard established by law for the protection of others against unreasonable risk of harm.” Restatement (Second) of Torts § 282. A person is negligent if he or she “fail[s] to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.” Restatement (Second) of Torts § 284(b).

Significantly, negligence may also lie “in the *creation* of a situation which involves unreasonable risk because of the *expectable action of another*.” See Rappaport v. Nichols, 31 N.J. 188, 201 (1959) emphasis added; see also Kelly v. Gwinnell, 96 N.J. 538, 544 (1984). Therefore, if a wrongful act of a third person could have been reasonably anticipated by the defendant who created the situation in which the risk could occur, then that defendant has a duty to act in a manner that would protect the victim from the wrongful act of the third person. See Harpell v. Public Service Coordinated Transport., 20 N.J. 309, 316 (1956). See also Restatement (Second) of Torts, §448.

In the instant case, Defendant James Moore created the situation that placed Plaintiff at risk of sexual assault from the reasonably expectable actions of Defendant Bryan Bosland. Defendant James Moore invited the aforementioned foursome into his home when they showed up at his house around 11:00 p.m. on August 27, 1996. This was the second time that Defendant Bryan Bosland had been at the Moore home that evening. See Exhibit A at 5. It does not matter whether the social guests at the Moore home precipitated the invitation themselves or came at the initiative of the host. See Cohen v. Kaminetsky, 36 N.J. 276, 279 (1961). All social guests are treated alike under the law. See id. Defendant James Moore owed a duty to Plaintiff, a licensee, to refrain from acting in a manner that could result in bodily harm to Plaintiff. See Barbarisi v. Caruso, 47 N.J. Super. 125, 131 (App. Div. 1957).

When Defendants Bryan Bosland and James Stoeckel, both neighbors of Defendant James Moore for years, see Exhibit F, came to the Moore home with two thirteen year old girls, it was clear that at least one person in the party, Plaintiff N.N., was visibly drunk and suffering from the ill effects of excessive alcohol consumption. See Exhibit A at 12; Exhibit B at 69-70; Exhibit C at 13; Exhibit D at 12-13; Exhibit E at 2. Plaintiff N.N. vomited numerous times in the

presence of Defendant James Moore. See Exhibit A at 12; Exhibit B at 69-70; Exhibit C at 13; Exhibit D at 12-13; Exhibit E at 2. Plaintiff passed out in a drunken stupor on the couch at the Moore house, and Defendant James Moore left her there in the presence of Defendant Bryan Bosland and the others and went upstairs to sleep. See Exhibit A at 13; Exhibit D at 13; Exhibit G.

Defendant James Moore asserts that he did not owe a duty to Plaintiff, or if he did, he did not breach that duty. One of the reasons proffered by Defendant James Moore in his claim of no duty or breach thereof is that “plaintiff never advised him that she had not told her mother where she was on the evening in question.” See Defendants’ Brief at 11. A reasonably prudent adult would conclude that a thirteen year old girl, drunk and sick, would not have her mother’s permission to traipse to a stranger’s house in the middle of the night with two adult men and another thirteen year old. Even if Plaintiff had told Defendant James Moore that her mother knew and approved of where Plaintiff was going that night, Defendant James Moore assumed a duty of care to Plaintiff to protect her from unreasonable harm on the premises when he invited her into his home as a social guest.

A reasonably prudent adult in Defendant Moore’s situation on the evening at issue would have been alerted that something was askew in the fact that two of his adult friends, wandering on foot in the night with two young girls, needed to stay at his house. During the evening at Defendant James Moore’s home, Defendant James Moore and his guests were outside on his patio while police cars cruised up and down his street. See Exhibit H at 3, 8, 10. The police were searching for the two girls, and that fact was known by Defendants Jason Stoeckel and Bryan Bosland, and Nicole Kelly. See Exhibit H at 5, 11; Exhibit I at 3-4. Defendant Bryan Bosland stated that the foursome stayed at Defendant James Moore’s home “because they saw cop cars and were afraid the police were looking for them. They knew someone was looking for the two girls so they stayed at Jim’s house for the rest of the night.” See Exhibit H at 11.

If Defendants Bryan Bosland and Jason Stoeckel were conversing about the police search for Plaintiff and her thirteen year old friend, Defendant James Moore would have heard it, since

he was in their company. Defendant James Moore would have known that his adult friends were seeking a hideout with their two thirteen year old companions for the evening. Defendant James Moore willingly created the harbor from which the two couples could remain concealed from the police search that night. Defendant James Moore set up the situation for Defendant Bryan Bosland to have sex with a drunk thirteen year old while the police looked for her.

Whether a duty exists is “ultimately a question of fairness[.]” See Kelly, supra, 96 N.J. at 544. The inquiry for the court “involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.” Id., quoting Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583 (1962). It is well settled that a defendant host owes a duty to his social guests to exercise reasonable care in the conduct of activities in the host’s home so as to avoid injury to persons who are invited into the host’s home. See Cropanese v. Martinez, 35 N.J. Super. 118, 124 (App. Div. 1955) (defendant owed a duty to plaintiff who was injured on defendant’s property while the two were building a fence); Barbarisi, supra, 47 N.J. Super. at 131 (defendant owed a duty to her grandson who was injured while defendant did laundry); Kelly, supra, 96 N.J. at 543 (defendant host owed a duty to guest who became intoxicated at defendant’s home and was involved in a car accident as he drove home).

In the case at bar an adult male invited into his home, in the middle of the night, two nineteen year old men who had in tow a pair of thirteen year old girls, one of whom was obviously intoxicated. A reasonably prudent twenty-one year old man should know under those circumstances that it is imprudent to offer harbor to two nineteen year old males and two thirteen year old girls and then leave them to entertain themselves in the basement for the rest of the night. The situation would seem even more suspect to a reasonable adult when one of the young girls was clearly incapable of exercising good judgment in order to protect herself because she was falling down drunk.

A reasonable man in similar circumstances could have easily anticipated the risk of sexual assault upon Plaintiff if he were to leave the basement and go to bed on another level of the house. Defendant James Moore was still in the room while Defendant Bryan Bosland, fully

alert and awake, was rubbing Plaintiff's back while she lay passed out. See Exhibit A at 13, 14. Defendant Jason Stoeckel stated in a police report that Defendant Bryan Bosland was kissing Plaintiff in the presence of Defendant James Moore. See Exhibit H at 6. Defendant Jason Stoeckel and Nicole Kelly were on the floor, see id. at 11; Exhibit A at 14, obviously paired up for the night. Furthermore, Defendant Bryan Bosland was acting toward Plaintiff in a manner that could be perceived as a prelude to sex to even the most casual observer.

A reasonable man in Defendant James Moore's situation would anticipate that once he, the proverbial fifth wheel left the basement to go to bed, Defendant Bryan Bosland would escalate his back rubbing and kissing of Plaintiff to commit sexual acts upon her. A reasonable man would know that sexual contact between a nineteen year old and a thirteen year old is blatantly improper, and that such contact is even more alarming when the thirteen year old is passed out on the couch from drinking too much. A reasonable prudent man in the circumstances would not have made the climate so available for a nineteen year old man to have sex with an incapacitated thirteen year old girl.

Based on the relationship of the parties, the nature of the risk, and the public interest in preventing that risk, Defendant James Moore owed a duty of care to Plaintiff in his home and he fell below the standard that reasonable society would demand of him. See Kelly, supra, 96 N.J. at 544. Courts have held that a neighbor owes a duty of care to another neighbor who helps him with a chore, that a grandmother owes a duty of care to her grandson while she does her laundry, that a host owes a duty of care to his drinking party guests, as in Cropanese, Barbarisi, and Kelly, respectively, to name only a few cases. It is respectfully submitted that a court would find a duty of care owed by a host to his child guest to guard the environment so that the child is safe from harm from the sexual advances of other guests.

Defendant James Moore helped to create the situation that put Plaintiff in peril of sexual assault, a serious risk, in his home that night. He had a duty to supervise the events in his house so as to protect Plaintiff from the unreasonable risk of invasion of her interest in bodily security. See Restatement (Second) of Torts §289, comment b. When he left her in a compromising

situation with Defendant Bryan Bosland, Defendant James Moore breached that duty. Had he not provided the haven or the opportunity for the sexual assault to occur, Plaintiff would not have suffered the harm of sex against her will that evening.

Defendant James Moore created the unreasonable risk of foreseeable harm that resulted in Plaintiff's injury. Moreover, based on fairness and policy that children should be protected from harm, especially children who are in a weakened mental and physical state, Defendant James Moore owed a duty to protect Plaintiff from the harm that was foreseeably likely to happen to her as a result of his creation of the risk of harm. See Kelly, supra, 96 N.J. at 544, citing Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

CONCLUSION

For the foregoing reasons Plaintiff respectfully requests that the Court deny Defendant James Moore's motion for summary judgment on the basis that a genuine issue of material fact exists. Defendant James Moore owed a duty to Plaintiff and he breached that duty. Defendant James Moore, therefore, is not entitled to a summary judgment as a matter of law.

Respectfully submitted,
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By: _____
Ann M. Pompelio

Dated: September 13, 1999