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COURT OF APPEALS

STATE OF NEW YORK

PINK,

Respondent,

-against-

No. 158

ROME YOUTH HOCKEY ASSOCIATION, INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
September 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Final matter on
2 today's calendar is number 158, Pink v. Rome Youth
3 Hockey Association.

4 Counsel.

5 MR. KELLY: May it please the court, may I
6 have two minutes for rebuttal, please?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. KELLY: This case involves the
9 opportunity for this court to take another look at
10 duty, and in this particular case, it's an important
11 one. Because I represent a recreational league that
12 provides recreational opportunities for young people,
13 and I represent one but there's many more of the - -
14 - like me all around the state. In this particular
15 circumstance, all of the cases that this court has
16 done before, for example, the asbestos case from last
17 summer, the Davis case from last summer. There's a
18 balancing test that must be applied here, and in this
19 particular circumstance, the unique circumstance
20 arises because not only do you have the gradient that
21 you usually have for doing the balancing test, you
22 have to also look at some of the social factors. And
23 in the - - -

24 JUDGE STEIN: Why - - - why doesn't the
25 landowners' duty apply? Why isn't this just an

1 extension or an application of the - - - of the
2 general landowners' duty, duty to keep the premises
3 in a reasonably safe condition?

4 MR. KELLY: Well, the landowner, certainly,
5 in the case has that obligation. In this particular
6 circumstance, we have someone who doesn't have
7 landowning responsibility.

8 JUDGE STEIN: Yeah, but that doesn't that
9 apply to tenants, as well, to - - - to less - - -
10 lessors or - - -

11 MR. KELLY: If - - - in this particular
12 circumstance, what the plaintiff is looking for is to
13 place upon us the duty of security for these kind of
14 events going forward. And of course, if you are
15 going to weigh the societal cost of that security
16 going forward, this court has already said repeatedly
17 in Custodi and Bukowski and all those other cases
18 that recreational opportunities are important.
19 They're beneficial activities. So - - -

20 JUDGE GARCIA: I read it a little bit
21 differently as to what they're saying the duty would
22 be, and I think the Supreme Court was fairly clear on
23 this. They said it's not a duty to provide security
24 that we're talking about here. It's a duty to either
25 eject or take other preventative measures. That was

1 the Supreme Court language. So I think they
2 specifically say we're not saying you should have had
3 security at this game.

4 MR. KELLY: Well - - -

5 JUDGE GARCIA: I think a Supreme Court
6 Judge said that.

7 MR. KELLY: Well, what I would do is I
8 would take it and look at it in a plain fashion. How
9 else are we going to eject people if we don't have
10 people dedicated to that type of situation?

11 JUDGE GARCIA: I think what they would - -
12 - what the answer to that would be is, and I'm not
13 saying this is the right answer, is under these USA
14 Hockey guidelines, you have an obligation to go to
15 the coach of the teams to control their spectators or
16 to eject them. And I would guess the hammer,
17 although it's not spelled out, is forfeiture. But -
18 - - so that I think is what they're saying. You
19 didn't do that.

20 MR. KELLY: And that's because, as in many
21 other youth facili - - - youth organizations
22 throughout this state, we don't have people at every
23 single game. We depend upon - - -

24 JUDGE GARCIA: You've got a referee.

25 MR. KELLY: We have a referee, and the

1 referee is the one who's able to decide what he wants
2 to do. He can cancel the game if he wants. He
3 retains that authority. In this particular case, he
4 didn't cancel the game. He went ahead and did it and
5 didn't have any particular disagreement with going
6 forward. It was a hockey game and maybe hockey is a
7 little more tumultuous than gymnastics or field
8 hockey, but you're still saying that for every
9 recreational league you are going to have an
10 affirmative obligation.

11 And I say that if in fact, you do that what
12 you're going to do is you're going to require these
13 recreational leagues to enter into a large burden.
14 In other words, they're going to have to have another
15 duty, and if you lay another duty on them what you're
16 going to do is you're going to reach the problem of -
17 - -

18 JUDGE ABDUS-SALAAM: What's the other duty
19 if the - - -

20 MR. KELLY: The other duty - - -

21 JUDGE ABDUS-SALAAM: If - - -

22 MR. KELLY: I'm sorry.

23 JUDGE ABDUS-SALAAM: Counsel, let me just
24 ask the question. If the coach can stop the game
25 anyway, for - - - for other reasons, what's - - -

1 what's an additional duty if there seems to be some
2 kind of brouhaha impending that the coach wouldn't
3 just stop the game?

4 MR. KELLY: Well, in other words, what
5 you're asking the coach to do is to not only watch
6 the game but he's got to watch spectators, and of
7 course those are two totally different
8 responsibilities. And my position is that if you
9 then require coaches to watch the crowd, remember,
10 the underlying facts of this particular case is that
11 the actors weren't involved in any of the dispute
12 beforehand.

13 JUDGE ABDUS-SALAAM: These are spectators.

14 MR. KELLY: So in other words, what you're
15 saying is everybody who's at the arena is a potential
16 tortfeasor.

17 JUDGE STEIN: Was the game already going?

18 CHIEF JUDGE DIFIORE: Are you saying that
19 the - - - the Youth Hockey Association or these
20 recreational leagues never have a duty to act to
21 minimize the risk that spectators might get into a
22 brawl or are about to get into a brawl?

23 MR. KELLY: I think that they have an
24 affirmative obligation if they're on notice of a
25 particular preexisting situation before a game even

1 begins, that there's been prior problems between this
2 team or that team or something of that. Here, what
3 we have is ambiguous testimony. Indeed - - -

4 JUDGE GARCIA: What if there's a fight in
5 the first period between spectators and they don't do
6 anything? Would that be different?

7 MR. KELLY: Oh - - -

8 JUDGE GARCIA: I mean does it have to be
9 before the game?

10 MR. KELLY: I would - - - I would say if
11 there's a fight that is quelled and resolved and the
12 game goes on, the game goes on. But if you're
13 suggesting that there's a fight that causes injury
14 and they do nothing, well, then we're going back to
15 the landowner. Recall that all - - -

16 JUDGE GARCIA: What if there's a fight and
17 they don't eject the people who are fighting? What
18 if those people get into, like, a physical
19 altercation? Not this type, but a physical
20 altercation in the stands?

21 MR. KELLY: Well, that's a - - - that's a
22 horse of a different color, I would say. And of
23 course - - -

24 JUDGE GARCIA: Right. But it doesn't have
25 to be before the game, right?

1 MR. KELLY: Well, it would have to be
2 somewhere where the people who are in authority have
3 notice of it. This is just like the other where the
4 property owner does not have an affirmative
5 obligation to - - -

6 JUDGE RIVERA: Well, but for purposes of
7 what? They have notice of it and they're going to
8 keep people out of the venue?

9 MR. KELLY: Sure. In other words, what
10 they're going to have to do is they're going to have
11 to - - -

12 JUDGE RIVERA: And is that their duty to
13 keep people out? That's as far as it goes?

14 MR. KELLY: Well, I think that - - - I
15 think that's what the plaintiff is suggesting here
16 that now the recreational leagues have an affirmative
17 obligation. Whether they're playing in an arena
18 somewhere or in a field somewhere, they have an
19 affirmative obligation. And I'm suggesting to you
20 that if you require that level of duty on a
21 recreational league, you're going to all of a sudden
22 increase the risk of that league's going forward.

23 And of course if there's an increased risk,
24 there's an increased duty that you have put on them,
25 then, of course, how do we allocate that risk? And

1 remember that in the Davis case this court said
2 listen, we want to allocate risk to the person that
3 can handle it at the lowest cost. So in Davis, you
4 said the doctor had to tell the people, hey, don't
5 drive if you've had drugs. Here, what the plaintiff
6 wants you to do is, hey, every league out there
7 throughout New York, you now have to control every
8 single spectator, and if you don't, you're going to
9 be liable. So there's a significantly greater duty
10 sought to be placed on them.

11 And I would suggest to you that the social
12 science materials that I submitted in the brief tell
13 you about what the consequences of that is. Doctor
14 Putnam's book and the treatises from the Journal on
15 Pediatrics all tell you about the fact that we should
16 be encouraging recreational activities. And in fact,
17 that's what this court has said. So I thought it was
18 a nice little way that this court's prior rulings on
19 those kind of areas come back to weigh in on this
20 particular case. So I don't think any duty should be
21 extended to the recreational leagues.

22 CHIEF JUDGE DIFIORE: Thank you, sir.

23 Counsel.

24 MR. KIRBY: Thank you, and may it please
25 the court, Andrew Kirby for the Pinks as respondents.

1 I believe that this court should affirm in all
2 respects.

3 JUDGE GARCIA: What - - - what should they
4 have done here?

5 MR. KIRBY: Very simply, self-execute what
6 was exactly in the zero tolerance policy.

7 JUDGE ABDUS-SALAAM: How?

8 JUDGE GARCIA: But the zero tolerance pol -
9 - - policy to me says you go to the coach, and
10 presumably of the team whose spectators are engaging
11 in this behavior, and you tell the coach to deal with
12 it, right. In this game, they've already thrown that
13 coach out, right?

14 MR. KIRBY: One of the coaches out, yes.

15 JUDGE GARCIA: Yeah. So they did that.
16 They threw the coach out, they threw players out,
17 they warned, I think there's evidence in the record,
18 some spectators who are near the penalty box. And so
19 isn't that a reasonable response to what was not at
20 that point a physical altercation?

21 MR. KIRBY: I think the point is - - - is
22 well made, Judge, but I believe that would be an
23 issue of fact for the - - - as the Fourth Department
24 said - - -

25 JUDGE PIGOTT: Was the game over?

1 MR. KIRBY: The game had just ended, Your
2 Honor.

3 JUDGE PIGOTT: Well, when - - - what's the
4 tail on this? How long do the - - - did the Hockey
5 League have to - - -

6 MR. KIRBY: Well, I believe until everyone
7 leaves the - - - the facility.

8 JUDGE PIGOTT: Really?

9 MR. KIRBY: Or at least leaves the stands.
10 I mean - - -

11 JUDGE GARCIA: So they could have thrown
12 them out of the game at that point?

13 MR. KIRBY: Well, I mean it - - - it - - -
14 I think if those - - - those - - -

15 JUDGE PIGOTT: Suppose they're fighting in
16 the parking lot when they get out of the - - - you
17 know, on their way out of the rink and heading to
18 their cars.

19 MR. KIRBY: Well, let's get back to the
20 point. If - - - if there was the verbal altercation,
21 if there was a continuing hostile environment that
22 the lower court and - - - and the Appellate Division
23 found existed, or at least a triable issue of fact,
24 the onus is on Youth Hockey to nip it in the bud.
25 That's the entire purpose of it.

1 case about a concert where there's an assault and we
2 say it wasn't the level of criminal activity that
3 usually happened at concerts so it broke the - - -
4 the causation or the duty chain scope, however we
5 want to phrase it. The Appellate Divisions have said
6 that, especially, I think Third or Fourth - - - it's
7 the Third, the Syracuse University case.

8 MR. KIRBY: Right.

9 JUDGE GARCIA: So you have a criminal
10 assault here. So what gives them this obligation
11 based on the facts, if we accept them, for purposes
12 of this motion?

13 MR. KIRBY: In that Syracuse-O'Connor
14 hockey game in which there was a sudden, described as
15 literally seconds between the verbal exchange that
16 preceded the criminal assault, and in that case the
17 court held, as I think should be held in - - - in
18 this court, there was not any indication a lapse of -
19 - - or a period of time in which that increasing
20 hostility took place. And that - - -

21 JUDGE GARCIA: And so yelling and - - -

22 MR. KIRBY: - - - is the distinction in
23 that case.

24 JUDGE GARCIA: And that's a sudden assault,
25 but there's no indi - - - here, what you have, again

1 reading it in the light most favorable to - - - to
2 the other party, you have people engaged in
3 inappropriate behavior, yelling, taunting, you know,
4 obscenities, but it's a sudden fight that breaks out
5 at the end of the game exactly as one of the cases,
6 and I can't think of which one particularly it is
7 right now, where a player is coming off and this
8 fight breaks out with this spectator.

9 MR. KIRBY: It was the Syracuse-O'Connor.

10 JUDGE GARCIA: Yeah, it's the Syracuse one
11 because then there's another one with a player and a
12 - - - and a ref. And it's a sudden assault, but
13 you're saying because we had parents yelling and
14 we've probably all been to games, engaging in
15 behavior that's offensive, clearly, they - - - this
16 escalates to the point where you should have taken
17 some measure to prevent a criminal assault.

18 MR. KIRBY: Well, I'll - - - I'll put it to
19 you this way, Judge. In the - - - in the moving
20 papers of the defendant the zero tolerance policy,
21 that should and was not followed in this case, would
22 have led to the ejection of the people who ultimately
23 started this fight.

24 JUDGE STEIN: Can that create a heightened
25 duty?

1 MR. KIRBY: I don't believe it's a
2 heightened duty, Judge. I think it's an industry
3 standard that USA Hockey is in the best position to
4 monitor all their local sports association. Had
5 created - - - had recognized the problem, it's a very
6 specific problem. It's that these verbal
7 altercations at these - - - at every level of amateur
8 hockey has led to numerous physical assaults
9 occurring at games.

10 JUDGE STEIN: Where are there - - - are
11 there any in - - - in this area that have ever
12 happened or at - - - at this - - -

13 MR. KIRBY: Not in this record, Your Honor.
14 On the other - - -

15 JUDGE STEIN: Well, what I'm - - - what I'm
16 mostly concerned about is exactly if there is this
17 duty how it is to be implemented. Because, you know,
18 you have mostly, if not entirely, a bunch of
19 volunteers, and you refer to the League and the
20 League has a duty and all this, but - - - but we're
21 talking about people, okay. And - - - and if we're
22 not talking about hiring security personnel, who has
23 the authority to take some of the actions that you're
24 - - - that you're suggesting? And I'll just extend
25 it and - - - a little bit further and how far do we

1 take this? Is - - - does it apply to T-Ball games,
2 you know, outside? You know, where's - - -

3 MR. KIRBY: I'm not - - - yeah.

4 JUDGE STEIN: - - - where's the limit?

5 MR. KIRBY: I'm not advocating for this,
6 and I think what counsel tries to do is make me look
7 like I'm putting this huge burden on all these
8 sports.

9 JUDGE STEIN: Well - - - well, we need to
10 know that, you know.

11 MR. KIRBY: Exactly. I'm saying for this
12 particular league, that's under the umbrella of USA
13 Hockey, they were told that you have to - - -

14 JUDGE STEIN: But we can't make a rule that
15 applies to one league, I don't think.

16 MR. KIRBY: Right.

17 JUDGE STEIN: We have to make a - - - a
18 more general rule. And I'm trying to - - - I'm
19 trying to figure out where you think that rule should
20 fall.

21 MR. KIRBY: I - - - I equate the - - -

22 JUDGE STEIN: And what it should be.

23 MR. KIRBY: - - - the common law of - - -
24 of the cases that I cite in my brief that all talk
25 about the heightened tension going on through the

1 game, mirror exactly what the - - - the duty that the
2 - - - and the purpose of the zero tolerance policy.

3 JUDGE ABDUS-SALAAM: Well, how about - - -

4 JUDGE STEIN: But those cases mostly have
5 hired security. That, you know, the - - - the - - -

6 MR. KIRBY: Well, not - - - not
7 necessarily.

8 JUDGE STEIN: - - - concerts and - - - and
9 the - - -

10 MR. KELLY: They have - - - some have to do
11 with restaurants, some have to do with bars and
12 discos. Here, and - - - and I think it's very
13 interesting - - -

14 JUDGE ABDUS-SALAAM: Counsel, with the zero
15 tolerance policy, how long does the altercation or
16 the verbal back-and-forth have to go? Would it be
17 one obscenity by one person and then that person is
18 ejected or - - -

19 MR. KIRBY: Well, I think it's clear-cut on
20 - - - on the way they've - - - they've created it,
21 and they know their - - - their fans and their
22 spectators and their parents best. And they - - -
23 their rule crafted for their - - - for their
24 participants - - - and by the way - - -

25 JUDGE GARCIA: But can't they give

1 themselves a heightened standard? I mean because
2 you're talking about children, you know, these are
3 thirteen-year-old players. Can't they say if someone
4 engages in obscenity, throw them out? But does that
5 mean that inc - - - that creates a duty on them to -
6 - -

7 MR. KIRBY: Well, it's - - - it's the same
8 duty - - -

9 JUDGE GARCIA: - - - that's going to lead
10 to liability for somebody taking a swing at somebody
11 else?

12 MR. KIRBY: It's the same duty that we've
13 recognized time and time again where there's
14 heightened - - - where there's a gathering of people
15 in a public place that are invited to be there. And
16 in this case, the people who are art - - - doing the
17 - - - the violation of the zero tolerance policy are
18 the parents who are part of these memberships.

19 JUDGE GARCIA: Wouldn't your rule encourage
20 them to have a not-so-zero tolerance policy anymore?
21 Because we don't want our leagues to have liability
22 so we had this rule, we were trying to protect these
23 kids, you know, bad behavior by parents, we
24 understand it's a problem. But if that's going to
25 give our volunteer organizations liability in every

1 county, then, you know what, we'll have a seventy-
2 percent tolerance policy.

3 MR. KIRBY: Well, I - - - I think - - - I
4 want to go back to - - -

5 JUDGE GARCIA: Or none.

6 MR. KIRBY: - - - to this particular
7 record. After this incident took place, it was very
8 interesting. The presidents of both associations of
9 both teams investigated. Mr. Mercurio, who was the
10 president of the Whitestown Team who's no longer in
11 the case, said the best solution going forward is we
12 reiterate the policy, we designate one of our members
13 to watch the tournaments, they assist the coach and
14 the refs to take out the violative participant.

15 JUDGE GARCIA: And who's paying for that?

16 MR. KIRBY: No one and that's the beauty of
17 it.

18 JUDGE PIGOTT: Yeah, but the problem is I
19 all of a sudden say, gee, I'm supposed to be there
20 tonight, but I can't I've got some other meeting.
21 And so there's nobody there, and therefore, they
22 violated that policy and therefore, they're liable
23 when, you know, somebody pops off.

24 MR. KIRBY: Well, if - - - if it comes out.
25 If it comes out. And - - -

1 JUDGE STEIN: Or the person that they
2 physically remove says, you know, charges them with
3 assault.

4 JUDGE GARCIA: Right.

5 MR. KIRBY: Right. Well, what happens and
6 what Mr. Mercurio said in 1410 in the record, the
7 procedure to follow is if they don't go you shut the
8 game down. You stop the game.

9 JUDGE PIGOTT: You make that sound like
10 it's so simple, and, you know, you've got all of
11 these kids and all of these people. Let me - - - it
12 seems to me that the person who got punched ought to
13 be suing the puncher.

14 JUDGE GARCIA: And you settled with the
15 puncher, I believe.

16 MR. KIRBY: Yes.

17 JUDGE GARCIA: And the City of Rome.

18 MR. KIRBY: Yes.

19 JUDGE PIGOTT: Just my - - -

20 MR. KIRBY: I believe they had the same
21 duty that Mr. Kelly is now fighting, Your Honor.

22 JUDGE PIGOTT: Well - - - okay.

23 MR. KIRBY: But - - - and Mr. Mercurio said
24 if none - - - none of that works simply call 911.

25 JUDGE STEIN: And couldn't any of the

1 spectators have done that?

2 MR. KIRBY: They could have and maybe the
3 members should have done that. But all I'm saying is
4 that when - - - when Rome Youth Hockey and USA Hockey
5 says this is a policy that is effective in curbing a
6 known occurrence that is occurring during our games,
7 I believe it doesn't heighten any duty. I believe
8 it's the same duty that's been recognized over and
9 over again. Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, sir.

11 Mr. Kirby.

12 MR. KELLY: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: I mean Mr. Kelly,
14 excuse me.

15 MR. KELLY: Plaintiff wants us to be thrown
16 into the special relationship master-servant teacher-
17 student situation, and that just shouldn't be done
18 and it's not a realistic way to format this. The
19 fact that we had a zero tolerance policy is merely
20 not binding on us because that's what the Gilson v.
21 Metropolitan Opera case said. We don't have a
22 heightened duty. It's just a guideline.

23 And of course, there is no proof of great
24 violence throughout the land. When we did the zero
25 tolerance policy, or should I say when USA Hockey did

1 it, it was trying to just reiterate the rules of
2 hockey about what's a penalty and what could happen
3 and also tell spectators that there could be lots of
4 assaults. But there aren't any. There's none in the
5 record. There's no cases about it. And it was just
6 merely trying to direct people's attention to proper
7 behavior. That's it. The case should be reversed,
8 and the plaintiff is not left without a remedy. It
9 had its remedy, and that's been fulfilled. Thank
10 you.

11 CHIEF JUDGE DIFIORE: Thank you.

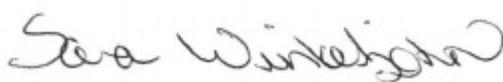
12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Pink v. Rome Youth Hockey Association, Inc., No. 159 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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