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Case Number 152,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRYAN CONNOLLY and SUSAN CONNOLLY, Individually and as Co-Administrators of the Estate of ETHAN P. CONNOLLY,	:	
Plaintiffs Below-Appellants,	:	
v.	:	No. 152, 2018
ALPHA EPSILON PHI SORORITY, Individually and t/a PHI CHI CHAPTER,	:	Court Below – Superior Court of the State of Delaware, in and for New Castle County
Defendants Below-Appellees.	:	C. A. No. 14C-08-006 FWW

APPELLANTS' OPENING BRIEF

BEVERLY L. BOVE, ATTORNEY AT LAW

Beverly L. Bove (ID No. 2013)
Vincent J.X. Hedrick, II (ID No. 2745)
1020 West 18th Street
P. O. Box 1607
Wilmington, DE 19899
(302) 777-3500
Attorneys for Appellants Brian Connolly and Susan Connolly, Individually and as Co-Administrators of the Estate of Ethan P. Connolly

Dated: June 20, 2018

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NATURE OF PROCEEDINGS

This case involves the tragic loss of a young university student's life that was both foreseeable and preventable by Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter (the "Sorority"). Ethan P. Connolly ("Ethan"), a 19-year-old sophomore at the University of Delaware, attended the Sorority's Crush Party on October 17, 2013, which was held off of Route 896 in Newark, Delaware at the Executive Banquet & Conference Center. The Sorority required attendees to travel to and from the event on buses. Although underage, Ethan was drunk, left the Sorority's Party on foot, and was killed by a vehicle while crossing Route 896.

Suit was filed on August 1, 2014. The Plaintiffs-below were Ethan's parents, Bryan Connolly and Susan Connolly, Individually and as Co-Administrators of the Estate of Ethan P. Connolly (collectively, the "Connollys"). The Sorority was a Defendant-below and is the party against whom this appeal is taken. After more than two years of discovery, the parties filed several *in limine* and dispositive motions. On February 28, 2018, the Superior Court issued an Opinion granting the Sorority summary judgment. The Connollys timely appealed. This is the Connollys' Opening Brief.

SUMMARY OF ARGUMENT

I. This Court should hold that summary judgment was inappropriate because genuine issues of material fact remained regarding whether the Sorority breached its legal duty. Under Delaware law and the Sorority's own governing rules and procedures, the Sorority had the duty to ensure that attendees at the Sorority's Crush Party, including Ethan, safely rode the buses to the Party, and that the attendees were returned safely to the University of Delaware campus. The Sorority simply needed to adequately monitor the attendees to determine whether they were underage and not drinking alcohol, were of age and perhaps imbibed too much and needed a taxi to be accompanied by a Sorority's sober sister back to campus, or, made sure all attendees at the end of the Party did not leave the building and returned on the buses to the University of Delaware campus. The Sorority assumed the duty of transporting attendees to and from the Party, recognized the dangers inherent in throwing a party for University students where alcohol would be served, ceded the Sorority's responsibility to unqualified Sorority members and others not qualified to determine whether someone was underage to drink alcohol, foresaw the dangers to attendees who did not use the provided transportation and thus required attendees to only use the transportation provided by the Sorority, and failed to see that Ethan was drunk at the Party and either needed a taxi accompanied by a sober sister or

failed to ensure that he boarded the bus at the end of the Party. The Connollys' experts testified that the Sorority breached the standard of care by failing to ensure that Ethan safely returned to the University campus and assumed the duty to do so as required in its own protocols. The Sorority's liability was a matter of factual dispute. The Superior Court's grant of summary judgment was error and should be reversed and remanded.

II. The Superior Court committed legal error by deciding proximate cause on a disputed summary judgment record. The Superior Court found that Ethan was the proximate cause of his death. Proximate cause is a fact question generally left for the jury's consideration. Weighing relative proximate causes of differing parties is within the province of the jury and not susceptible to summary judgment. There may be various proximate causes for one injury which the jury must evaluate based upon the facts presented. Whether Ethan's conduct was a proximate cause of his death, and whether the Sorority's failures were proximate causes of Ethan's death, are all genuinely disputed facts. The precise duties the Sorority assumed were to ensure that Ethan did not drink alcohol at the Party as he was underage and to return him safely to campus by bus. The Sorority's breaches of those duties led precisely to the foreseeable harm that befell Ethan. It makes little sense to hold as a matter of law that the Sorority is insulated from compliance with its duties because the exact

foreseeable result occurred, namely, that Ethan drank alcohol and was killed. These are facts to be weighed by a jury. The Superior Court's proximate causation ruling on summary judgment was improper.

STATEMENT OF FACTS

A. Ethan's Death

Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter, a Greek sorority on the campus of the University of Delaware, hosted a "Crush Party" (the "Party") on October 17, 2013. The Party was held miles away from the campus of the University of Delaware at the Executive Banquet and Conference Center. It began some time before 10:30 p.m. and ended some time before 12:30 a.m. (A346, A435, A537).

Ethan left the Party, walked to Route 896 with 2 other young gentlemen, attempted to cross the road and was killed by a pickup truck. Ethan was pronounced dead at the scene at approximately 12:53 a.m. and was intoxicated (A234-A260; A261; A262-A264; A265-A266).

B. The Sorority's Party

The Sorority threw the Party on October 17, 2013 off campus (A323, A327, A329-A330; A536). This "Crush Party" is by invitation only and the Sorority's members are given one or two tickets, depending on seniority, to bring a date or dates with them (A286). The Party was scheduled from 10:00 p.m. to 1:00 a.m. for 300 attendees (A344, A421; A521). The disc jockey played music until approximately between 12:15 a.m. and 12:30 p.m. when the Party was over, and

attendees then got on the buses (A435, A542). Ethan was pronounced dead at 12:53 a.m. (A234-A260).

Sarah Eller, Vice-President of Social Responsibility of the Sorority's local chapter, was responsible for organizing the Party, hiring the venue, hiring transportation, and signing the contract (A322-A323; A325; A391; A513-A520; A529; A541). The Sorority held parties off campus so that alcohol could be served and thus, not violate campus policy (A329-330; A338). Specifically, sororities were not permitted to sponsor parties with alcohol on campus, because those parties are potentially dangerous for underage drinking (A330, A554-555; A521). No Sorority members were assigned to ensure that underage attendees did not drink alcohol (A433; A538-A539). The Sorority members relied on others to check for underage attendees, but never asked any questions about their qualifications to do so (A331-332; A531).

The Sorority's Social Events and Chapter Activities Policy required that the Sorority provide transportation for all off campus parties (A360, A364, A379, A521, A555, A641). Moreover, the Sorority's policy required that all attendees use that transportation to and from the Party, and it was the Sorority's responsibility to enforce its own policy (A360, A378, A397-A399; A530). As part of this policy, if an attendee at the Party was intoxicated, the Sorority's members would make sure that the attendee was sent back to campus by taxi

with a sober sister, a member not drinking alcohol (A418, A530). The purpose of the Sorority's policy was specifically for the safe return of attendees to campus (A360, A398). Additionally, the Sorority's members were to ensure that alcohol was not brought onto the bus (A361). However, the Sorority's members did not check male attendees entering the buses for transportation to the Party (A362). No Sorority member was in charge of making sure that no one left the Party before it was over (A419). No one took attendance after the Party of the attendees riding the buses back to campus (A420; A543-A544).

Ethan was invited and attended the Party with Sorority member Stephanie Auerbach (A395-A396; A522-A523; A528; A532-A533; A534; A536) and rode to the Party with her on the bus (*Id.*; A379; A395; A412; A456; A462). Sarah Eller testified that Ethan and Stephanie Auerbach were on the bus together and attended the Party with Stephanie (*Id.*). Stephanie had one date ticket, and attended the Party with her date (*Id.*). Tickets for the Party were collected by the Sorority that had the names of the Sorority members' dates for the Party, so the Sorority knew who was in attendance (A362, A368-A369; A371-A373). Those tickets were given to the University by the Sorority after Ethan was killed, and not kept by the Sorority or University (A456-A457). The final list of attendees was handed into the University Greek life office (A370), but was never produced in discovery. Before the Party and boarding the bus,

each attendee would write their name on an attendance sheet, and those also were not produced in discovery and not kept by the Sorority or the University (A373). Sorority member Carly Levinson said that Ethan attended the Party with Stephanie (A534). Ethan met David Bernstein on the bus to the Party, and was with Ethan when he walked across Route 896 (A234-A260; A561-A563). Stephanie texted Ethan on her cell phone around midnight, telling him that she was too drunk and in the lobby, and told him to have fun (A525-A526). She later texted him asking where he was (*Id.*). The day after, the University confirmed that Ethan was at the event and walked away from the event (A559-A560). The next day, during the investigation by the University, Stephanie said Ethan was drunk at the Party (A449).

The Connollys proffered eight witnesses to be called at trial who were at the Party, saw Ethan at the Party, and saw him drinking alcohol at the Party (A561-A563). Those witnesses are David Muir (who left the Executive Banquet Center with David Bernstein and Ethan on foot, and walked to Route 896), Chris Razzano, Dan DeNiculo, Caroline Kisiba, Sydney Slako, and Carly Levinson. None of the defendants deposed any of these witnesses (A564-A566).

Although drunk, no one called a taxi for Ethan and sent him back to campus with a sober sister as required by the Sorority's own policy. No one made sure

Ethan did not leave the Party in a drunken state. No one made sure that Ethan rode the bus back to campus. Ethan left the Party and was killed close in time to the buses traveling back to campus. The Sorority violated its policies in failing to take reasonable measures to prevent Ethan from leaving on foot and by failing to do any of the above actions, leading to Ethan's death.

Prior to this Party and Ethan's death, the Sorority had experience with alcohol problems at Sorority parties. In 2002, the Sorority was placed on probation for serving alcohol at a party on campus (A548). In 2011, the Sorority was again placed on probation for alcohol-related problems at a party leading to destruction of property at the Baltimore Sheraton (A387; A549-A553). The Sorority also has had problems with chapters at universities, other than at the University of Delaware, related to alcohol use. For example, the Sorority was closed at Emory University for hazing violations, it was closed for 12 years at the University of Michigan for alcohol violations, and it was closed at University of Buffalo for violation of alcohol policy (A556-A558). It was foreseeable to the Sorority that generally, there were several potential problems with having alcohol at the Sorority's parties, and specifically, Ethan's death was foreseeable, as the precise harm that befell him was what the Sorority's transportation policies were designed to preempt.

ARGUMENT

I. The Superior Court erred by granting the Sorority summary judgment. The Sorority owed a legal duty to Ethan Connolly to return him to campus and the Sorority breached that duty.

A. Question Presented.

Did the Sorority breach its duty to Ethan Connolly to provide safeguards to return him to campus for prevention of resulting harm that was foreseeable? This question was raised below in the briefing on the Sorority's Motion for Summary Judgment, and further expounded upon during oral argument on that motion (A81, Trans. 60792097; A158-190; A211-A212).

B. Scope of Review.

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *GMC Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument.

The Sorority was responsible for the safety of its attendees at its Party, including, but not limited to, its ongoing responsibility to monitor those at its Party, making sure that anyone inebriated be returned by taxi with a sober sister to campus, or, at the end of the Party, ensure that the attendees board the buses for return to campus. The Connollys have set forth evidence for a jury to conclude that the Sorority breached its duties, proximately causing Ethan's death.

i. The Sorority's legal duty was defined by its own Policies and Regulations, which it breached.

The Sorority's Policies and Regulations required that it provide transportation to its partygoers to and from the party between the University of Delaware campus and the Executive Center. "Chapters must charter transportation for all social events held away from the chapter premises," meaning off campus, for the safety of attendees (A360-A361; A641). Additionally, the Sorority required that its attendees must use the provided transportation, and not arrive or leave the party via any other transportation for the security and safety of the attendees (A360, A364, A379, A398, A530, A555).

Moreover, the Sorority was required to monitor its party attendees, and if anyone was intoxicated, protocol dictates that the Sorority call a taxi and send a sober sister with that attendee safely back to campus (A418, A530).

Ethan rode the bus and attended the Crush Party (A395, A396, A397, A412, A456, A462, A528, A532-A533; A534-A536). Stephanie Auerbach, a Sorority member, brought Ethan to the Crush Party as her date (*Id.*). She attended the event with Ethan (*Id.*). Ethan left the Crush Party with a fraternity friend and got hit by a truck (A234-A260; A444). The Sorority did nothing to limit the number of alcoholic drinks a person could have (A431). The Sorority failed in following its own policy to make sure that the attendees got on the bus at the conclusion of the Party back to campus (A397-A398). Subsequent to Ethan's death, the Sorority's breach of policy was discussed by the Sorority Executive Committee and then with the entire Chapter members, and the Minutes were requested to be produced in discovery but it is claimed the Minutes now do not exist (*Id.*; A440-A441; A447). Ms. Eller confirmed this breach of Sorority policy. *Id.* "But you're still supposed to ensure that everybody gets on the bus, correct? Yes." (A 398). One of the reasons for the policy is to make sure attendees get back safely to campus. *Id.* It is the Sorority's responsibility to make sure that everyone gets back safely to campus (A399). There was no one in charge from the Sorority to make sure that no one left the Party before the Party was over to ensure they would get back on the bus to return to campus (A419, A540). The Sorority did nothing to keep track of attendees that were at the Party and whether they returned on the bus, as there were no sign-in sheets (A419-A420).

The Sorority's Party ended after the last song, sometime between 12:15 a.m. and 12:30 a.m., when attendees boarded buses for return to campus (A435, A542). It is undisputed that Ethan was hit and pronounced dead *after* the party ended (A234-A260). When Ethan was hit, he was approximately .3 miles away from the venue. *Id.* The Superior Court's factual conclusion that "[i]t is undisputed that Ethan was killed before the crush event ended" (Memorandum Opinion and Order, p. 35), is not accurate. To the extent there is disagreement on this factual issue, it is a disputed issue of fact for the jury's determination. Surely, judicial resolution of this issue of fact usurped the province of the jury.

The Superior Court held that the Sorority owed a duty to Ethan to take Ethan to the Party and return him safely to campus (Memorandum Opinion and Order, p. 34). This holding is supported by Delaware law. *Restatement of Torts 2d. § 323* provides that one who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if his failure to exercise such care increases the risk of such harm. *Restatement § 323* has been recognized by the Delaware Supreme Court. *Jardel v. Hughes*, 523 A.2d 518 (Del. 1985) at 524 and *Furek v. University of Delaware,* 594 A.2d 506 (Del. 1988) at 521. This section applies to any undertaking to render service to another

which the defendant should recognize as necessary for the protection of other persons, and the harm to be protected against results from negligence in the performance of the undertaking or failure to exercise reasonable care to complete the work to protect the other when he discontinues it. *Jardel* at 524. Because the Sorority undertook the duty to provide transportation requiring its attendees to ride the buses to the Party and ride the buses after the Party back to campus, the Sorority assumed the duty to make sure that the attendees returned to campus and the Sorority failed in complying with its duty, which it expressly assumed. As a result, Ethan was killed. *See also Section 324, comment B (*in which that rule applied equally where the other is rendered helpless by his own conduct...as where the actor takes charge of one who is ill, etc.).

Section 324 also applies, and *Illustration 3* to that section is helpful here. In that illustration, A, a passenger on a train, is drunk and disorderly. The train conductor removes A from the train to the platform and takes A halfway up the stairway. A, while climbing the rest of the stairs, falls. The Railroad is subject to liability. Sorority's reliance below on *McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994) is misplaced, as the Court limited its holding to only cases involving tavern owners, noting that Section 324 has application in other contexts. "Our holding that *Restatement § 324* cannot serve as a substitute for Dram Shop liability is limited to the fact situation under review, *i.e.*, injury resulting from removal of

an intoxicated person from a tavern. We need not decide whether other situations may warrant application of the principles of §324 or its equivalent. *See Williams v. Saga Enterprises, Inc.*, 225 Cal. App. 3d 142, 274 Cal. Rptr. 901 (1990) [**12] (bartender returned car keys he had been withholding by prior agreement to an intoxicated patron); *Galvin v. Jennings*, 3d Cir., 289 F.2d 15 (1961) (tavern owner gave specific driving instructions to obviously intoxicated patron)."

Case law demonstrates that the Sorority owed a duty of care to the Plaintiffs that it breached. For example, in *Grenier v. Conn's of Transp.*, Conn. Supr., 51 A.3d 367 (2012), the plaintiff was a pledge of a fraternity. The fraternity had an event in New York City, and provided that the attendees of the event were to ride the train to the event and back to campus after the event. The plaintiff brought suit alleging that the fraternity was negligent in supervising, organizing, and control of the activities of the attendees, and had a duty to provide safe transportation to and from the fraternity event, that such a duty was foreseeable and within sound public policy, and that there were issues of material fact. The fraternity filed for summary judgment claiming it had no duty owed. In reversing the trial court's grant of summary judgment, the Appellate Court held that: "One who gratuitously undertakes a service that he has no duty to perform must act with reasonable care in completing the task assumed." "If one undertakes to perform an act and performs it negligently, it makes no difference whether the act was performed

gratuitously." "One who undertakes to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if his failure to exercise such care increases the risk of harm." *See also*, *EMI Music Mexico v. Rodriquez*, 97 S.W. 3d 847 (Tex. App. 2003); *Terrell v. LBJ Electronics*, 470 N. W. 2d 98 (1991). The defendant's duty of care arises out of the relationship which the defendant created when the defendant voluntarily assumed the duty of transportation. When the defendant voluntarily performed this function, it assumed a duty to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task. *See also*, *Stephenson v. Universal Metrics, Inc.*, 641 N. W. 2d 158 (2002). Liability is imposed on a person who has a duty to act when that person gratuitously undertakes to act, then acts negligently.

As in these cases, the Sorority's providing of transportation to the pledges was a service to another which the Sorority recognized as necessary for the protection of the attendees. The Sorority not only should have known, but did know, and had a specific policy to require and provide transportation to attendees at off campus parties where alcohol was being served, that coordinating an off campus, late night event about the risks of not having attendees drinking alcohol get back on the bus to return to campus. The Sorority selected the manner of

transportation for attendees and it became obligated to exercise due care to secure Ethan's safe return to campus. The Sorority voluntarily assumed a duty of care regarding Ethan's safe transportation to and from the Party, and whether it took reasonable measures to exercise that duty is a jury question.

It is certainly foreseeable that a drunk college student, underage or not, would be put in grave peril if allowed to leave the premises for the long walk back to the University of Delaware via Route 896. The Sorority's failed attempt to provide transportation and regulate its attendees' activities is a recognition that potential harm exists. *Furek* at 521. Indeed, the vice president of social activities who arranged this Party acknowledged that the Sorority violated its duties of transportation owed to attendees.

Clearly, the fact that Ethan was permitted to leave the Executive Banquet Center on foot is a proximate cause of his death. The resultant harm to Ethan was foreseeable, as this was precisely the type of harm that the Sorority's own policies and regulations were designed to prevent. By enacting its policies and procedures, the Sorority has recognized the foreseeability of harm to attendees not traveling by bus. Also, the Sorority had prior experiences with harm resulting from alcohol use at its parties, which resulted in the Sorority being placed on probation. Had the Sorority executed its duty to make sure Ethan traveled back to campus on the bus, he would not have perished, drunk or not. *See Furek.*

There is no question that the Sorority breached its duty to return Ethan safely to campus. There is no question that the Sorority was responsible for the safety of attendees, yet did nothing to ensure that the attendees did not leave the Party. There is no question that the Sorority failed to either prevent Ethan from attending the Party, if he got drunk before getting on the bus or while on the bus, or failed to have him taken from the Party by taxi with a sober sister back to campus, or failed to ensure that he boarded the bus for return to campus. The Connollys have provided the opinion of an expert toxicologist that Ethan more likely than not consumed alcohol at the Party, and experts' opinions that the Sorority breached its duties owed (A567-A640). Certainly, the Sorority's breaches of its owed duties are disputed issues of fact for the jury's consideration. *See Furek*; *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E. 2d 920 (N.C. App) (defendant owed duty by voluntarily undertaking education regarding safety); *Adams v. United States*, 2009 U.S. Dist. Lexis 66058 (D. C. Idaho 2009) (defendant undertook duty where no special relationship existed).

ii. The Superior Court committed three fundamental errors by granting the Sorority summary judgment.

The Superior Court's decision granting summary judgment to the Sorority on the issue of Sorority's legal duty is flawed in at least three respects. First, the Superior Court made factual findings about the Sorority's responsibility of transporting attendees to the Party and whether that duty was breached, even though genuine issues of fact remained on that issue. The Superior Court made multiple conclusions about what, how, and importantly, when, certain facts occurred prior to Ethan's death. The clearest example is when the Court ruled that Ethan was killed before the Party ended. Reading the facts in the light most favorable to the Connollys leads to the conclusion that this was in error. At the very least, this issue presents an issue of fact for the jury's consideration.

As this Honorable Court recently held in *Pavik v. George & Lynch, Inc.*, No. 160, 2017, (March 23, 2018), in reversing the Superior Court's granting of summary judgment, the Superior Court improperly characterized case law, thereby usurping the role of the jury as fact finder. "By framing this case as one that turned on the scope of George & Lynch's duty to Reed and other motorists, the Court took for itself the inherently fact-bound question of whether George & Lynch should have provided additional temporary warning signs about potential road conditions." Here, the result is no different, as the Superior Court committed

legal error in finding that the Sorority did not breach its duty to Ethan, and because this fact-bound question of the Sorority's breach of its duty involves disputed issues of fact for resolution by the jury, not the Court.

Therefore, when viewing the record in the light most favorable to the Connollys, there are clearly genuine issues of material fact remaining on the issues of whether the Sorority complied with its duties to call Ethan a taxi to return to campus with a sober sister, whether the Sorority complied with its duties to keep attendees from leaving so that they may return to campus on the bus, and whether the Sorority complied with its duties of making sure all attendees at the Party got on the buses to return to campus. The Superior Court erred by ignoring the testimony of the Sorority's members on these points, and erred by accepting the Sorority's assertions as true of what, how, and when things occurred prior to Ethan's death, supporting the Sorority's view that it did not breach its legal duties. *See Patton v. 24/7 Cable Company, LLC*, 2016 WL 4582472 (Del. Super. Aug. 31, 2016) at *5 (finding that a disputed issue of material fact remained despite belief that subcontractor acted appropriately). The Sorority's responsibility was a disputed issue of fact that required reconciling conflicting testimony – a task for a jury, not a judge.

Second, the Superior Court erred by finding as a matter of law that the Sorority did not breach its duties owed to Ethan. Again, whether the Sorority fully

complied with its policies and procedures in making sure that drunk attendees be returned to campus early via taxi with a sober sister, or whether the Sorority kept attendees from leaving so that it could comply with its regulation that all attendees return to campus by bus, or whether the Sorority ensured that all attendees boarded the buses after the last song was played, are disputed issues of fact. Viewing the facts in the light most favorable to the Connollys:

i) The Sorority's members had duties to comply with the Sorority's own Policies and Regulations to ensure attendees, one way or another, were returned safely to campus either during or after the Party;

ii) The Sorority did not assign the responsibility to any member to monitor attendees to determine if attendees were drunk, whether attendees intended to leave the Party, if attendees needed to be returned early to campus, or if attendees understood that they were to only board the buses and not leave the premises, or if attendees did not board the buses at the Party's end.

iii) The Sorority breached its duties by failing to recognize the risk of underage drunk attendees and take the simple step of returning them early with a sober sister by taxi to campus, making sure they did not leave the premises prematurely, or, canvas the premises to make sure that no attendees lagged behind or left before boarding the buses.

The Superior Court's conclusion that there was no factual dispute that the Sorority fully complied with its duties, and specifically, its Policies and Procedures, was legal error. These fact-intensive questions, especially when viewing the facts in a light most favorable to the Connollys, should only be answered by a jury and not by the Superior Court on summary judgment.

II. The Superior Court's factual finding that Ethan's own conduct was the only proximate cause of his death was not appropriate on summary judgment.

A. Question Presented.

Did the Superior Court improperly make a factual finding on a disputed record that Ethan's actions constituted the only proximate cause between the Sorority's breaches of its owed duties and Ethan's death? This question was raised below in the briefing on the Sorority's motion for summary judgment, and further explored during oral argument (A76, Trans. 60791538; A190-A196).

B. Scope of Review.

This Court reviews "the Superior Court's grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *GMC Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

C. Merits of Argument.

"Generally speaking, issues of negligence are not susceptible of summary adjudication." *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962). Likewise,

"questions of proximate cause except in rare cases are questions of fact ordinarily to be submitted to the jury for decision."

The Superior Court stated its causation ruling on pages 36 to 38. The Superior Court discussed in the decision below, that Ethan was the proximate cause of his own death. *Id.*

The Superior Court committed legal error by finding that Ethan's actions broke any proximate cause of the Sorority from breaching its duties owed to Ethan. As discussed above, the Sorority's own duties to Ethan were designed to protect him from the precise harm that he suffered, *i.e.*, providing transportation to and from the event and ensuring that attendees used that transportation for the safety and security of the attendees at a party where alcohol was served. After finding that a defendant owed and breached a duty to protect a partygoer from injury, and that because the partygoer drank alcohol at the party where it was served and defendant did not comply with its duty to return the partygoer safely home and partygoer was foreseeably hurt from his own actions as a result, it makes little sense to forgive the defendant's breach of that duty because the partygoer was foreseeably harmed.

The Delaware Legislature has recognized that underage persons are not capable of handling the drinking of alcohol and its residual effects. Specifically,

no person shall sell any alcoholic liquor to anyone that has not reached the age of twenty-one. 4 *Del. C.* § 708. There is criminal liability for serving alcohol to underage persons under the age of 21, defined as minors, or to sell alcohol to adults for use by minors. 4 *Del. C.* § 903, 904(a), 904 (d). Entities are prohibited from permitting underage persons to sit, stand or remain at a bar or service counter, even to get a soda or glass of water. *Commissioner Rule No. 52.* Ethan, for all intents and purposes, is considered a minor as he was underage to be served alcohol. *Newark, De. Code of Ordinances Sec. 19-1.* According to the *Newark Code*, minors are not even permitted to be in a place where alcoholic liquors are sold, dispensed, served or offered, and sale to minors is strictly prohibited. See *Sections 19-3 and 19-7.* Certainly, Delaware has recognized that minors do not have the capacity to appreciate the effects of alcohol and have prohibited others from selling, serving, or providing, directly or indirectly, alcohol to minors.

However one characterizes Ethan's conduct, it is for a jury to decide how it should be characterized. The jury may consider Delaware law that underage persons are not competent to appreciate the effects of alcohol, whether an underage person like Ethan with his age, experience, and problems with dealing with alcohol in the past, acted reasonably; and whether the Sorority was in a better position and fulfilled its duties to protect attendees like Ethan by inadequately providing transportation to the Party and failing to return him to campus, putting in place

safeguards for ensuring attendees got on the buses to return to campus, which the Sorority did not do. As the Delaware Supreme Court noted in *Helm v. 206 Mass. Ave. LLC*, 107 A.3d 1074 (Del. Supr. 2014), comparative negligence is an issue of fact for the jury to consider.

Various Delaware decisions are in accord. For example, in *Marks v. Dewey Beach Enters.*, 2006 Del. Super. Lexis 722 (Del. Super. 2006), the plaintiff went into a bar after docking his boat to drink alcohol, and subsequently left the bar in the dark walking backwards and fell, sustaining injuries. The Defendant bar argued that plaintiff's conduct was a complete bar to the action and was the sole proximate cause. The Court disagreed, finding issues of material fact in dispute whether the Plaintiff, while walking backward, was negligent in causing his injury and if he was negligent, whether that negligence was greater than that being attributed to the Defendant. In addition to the plaintiff's conduct, issues of fact were presented about the condition of the dock boards and sufficiency of lighting. Importantly, this Court distinguished *Trievel v. Sabo*, 714 A.2d 742 (Del. 1980), a case primarily relied upon by the Sorority below, noting that the holding in *Trievel* was strictly limited to the circumstances presented in *Trievel*.

In *Trievel*, the trial court dismissed plaintiff's case at the close of plaintiff's evidence at trial. In affirming the trial court decision after hearing plaintiff's case at trial, the Supreme Court held that "questions as to the existence of negligence

are reserved for the trier of fact." The defendant is under an obligation to proceed with caution and keep a proper lookout. However, the evidence showed that the plaintiff peddled her bike through a stop sign, plaintiff ignored a sign that traffic was to go to the right, and plaintiff peddled in front of an oncoming car and into the left passing lane directly into the car driven by defendant. During the trial, none of the seven witnesses testified that the defendant was speeding or doing anything negligently. No one implicated the defendant. There was no dispute that the Defendant was not negligent considering the evidence at trial. Unlike *Trievel*, issues of fact are presented by the jury of whether the Sorority breach its duties owed and assumed by it in not maintaining the care of its attendees, controlling their activity at its Party, not providing proper transportation back to campus safely, and not complying with its requisite duties of care to Ethan. Because there are issues of fact for resolution by the jury which do not rise to the level of the rare case like *Trievel* where the trial evidence presents no issue concerning the *Trievel* defendant's conduct, the Sorority's Motion for Summary Judgment regarding Ethan's conduct should have been denied. See also, *Hufford v. Moore*, 2007 Del. Super. Lexis 669 (Del. Super. 2007) (*Trievel* holding is limited to its facts, and issues of comparative negligence and gross negligence and proximate cause are all issues of fact for jury resolution).

Indeed, as the *Marks* Court noted in *Patton v. Simone*, 626 A.2d 844, 852 (Del. Super. 1992), the Court denied summary judgment and defendant's claim that plaintiff's conduct barred plaintiff's action even though plaintiff assumed the risk of the open elevator shaft in which he fell to his death. The question of plaintiff's degree of secondary assumption of the risk should be a jury question. Many decisions are in agreement. See, *e.g.*, *Black v. Chromascape*, 2016 Del. Super. Lexis 398 (Del Super. August 9, 2016) (weighing degrees of fault cannot be determined as a matter of law); *Thompson v. Cope*, 2001 U.S. Dist. Lexis 25576 (D. Del. 2001) (although plaintiff was a drunk pedestrian, relative degrees of fault are questions of fact for the jury); *Heronemus v. Ulrick*, 1998 Del. Super. Lexis 386 (Del. Super. 1998) (plaintiff's comparative negligence for alcohol consumption is an issue of fact for the jury); *Jackson v. Thompson*, 2000 Del. Super. Lexis 413 (Del. Super. October 12, 2000) (plaintiff's inebriation while riding a bicycle and comparative negligence were issues of material fact for the jury and summary judgment denied); *Phillips-Postel v. BJ Prods.*, 2006 Del. Super. Lexis 615 (Del. Super. April 26, 2006) (comparative fault issue of fact for jury resolution); *Helm*, *supra.* (plaintiff's conduct was an issue of fact for jury to decide); *Hudson v. Boscov's Dep't Store, L.L.C.*, 2017 Del. Super. Lexis 44 (Del. Super. Feb. 1, 2017) (*Trievel* not controlling, and issues of the parties' respective fault were for resolution at trial); *Pipher v. Parsell*, 930 A.2d 890 (Del. Supr. 2007)

(disputed issues of foreseeability and proximate cause involve factual determinations that must be submitted to the jury); *Jefferis v. Commonwealth*, 537 A.2d 355 (Pa. Super. 1988) (comparative negligence of minor fact for jury); *Lorca v. Green*, 2001 Del. Super. Lexis 531 (Del. Super. December 20, 2001) (relative degrees of fault not susceptible to summary judgment).

In *Hawkes v. Christiana Health Sys.*, 2017 Del. Super. Lexis 258 (Del. Super. May 31, 2017), the Superior Court held that granting summary judgment is rare in a negligence action because the moving party must demonstrate not only that there are no conflicts in the factual contentions of the parties but that also, the only reasonable inferences to be drawn from the uncontroverted facts are adverse to the plaintiff. *Hawkes* was not that rare case, where the Plaintiff saw but disregarded a yellow cone warning of danger and slipped on ice cream that was under the cone. The *Hawkes* Court held that whether the plaintiff was negligent or more negligent than the defendant is an issue of fact for the jury. Here, likewise, *Trievel* is not controlling, as issues of material fact are presented for resolution by the jury.

Whether Ethan's drinking was a proximate cause of his death is a disputed issue of fact for the jury's consideration. As cited above, an underage youth is not charged with his actions of drinking as he cannot comprehend those actions and the possible harm that exists as a result. Any weighing of respective fault of Ethan in

comparison to the Sorority's breached duty, presents clearly disputed issues of fact for a jury's consideration and resolution.

The Superior Court also discussed in its decision intervening/superseding causation. However, the Superior Court never concluded that Ethan's actions constituted an intervening/superseding proximate cause cutting off the Sorority's negligence. Even if the Court below engaged in a proper consideration of all factors in determining intervening/superseding causation, such a finding can only result from a comprehensive review of all of the facts by the jury. Superseding causation, like proximate cause, is fact-driven and "considerations of foreseeability and what a reasonable person would regard as highly extraordinary are factual questions ordinarily reserved for the jury." *Duphily v. Delaware Electric Cooperative*, 662 A.2d 812, 830-831(Del. 1995). A Court may only find that a cause is superseding – the sole proximate cause – when reasonable minds cannot differ as to whether the intervening cause is so "abnormal, unforeseeable or extraordinarily negligent." *Id.* at 831. Here, the harm to Ethan was an expected risk of young people attending a party with alcohol, which was foreseeable by the Sorority, and was the exact reason for its alcohol policy requiring the Sorority to fulfill its responsibility of safely transporting attendees to and from the party. It was error for the Superior Court to conduct this fact intensive inquiry and resolve disputed issues of fact on summary judgment. Similarly, if the Superior Court

concluded that Ethan's conduct was a superseding cause, then the Superior Court necessarily concluded that Ethan's conduct was not foreseeable as a matter of law. The Superior Court erred, as a party remains liable even if another party's later negligence contributed to the plaintiff's damages – so long as the second party's negligence was foreseeable. *Laws v. Webb*, 658 A.2d 1000, 10007-1008 (Del. 1995). "In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor." *Duphily*, 662 A.2d at 829. "The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct." *Id.* Here, it was certainly foreseeable to the Sorority that an attendee may be drunk at the party, either drinking before, during the bus trip, or at the party, as the Sorority had procedures in place for the safety of attendees in each circumstance, although it did not follow them. The Sorority is not relieved of its owed duties to Ethan. Under the applicable standard of review, the Superior Court could not properly conclude on this record that Ethan's conduct was "neither anticipated nor reasonably foreseeable." *Id.* To do so would be legal error.

CONCLUSION

For these reasons, this Honorable Court should reverse the Superior Court's grant of summary judgment to the Sorority and remand for a trial.

BEVERLY L. BOVE, ATTORNEY AT LAW

/s/ Beverly L. Bove
Beverly L. Bove (ID No. 2013)
Vincent J.X. Hedrick, II (ID No. 2745)
1020 West 18th Street
P. O. Box 1607
Wilmington, DE 19899
(302) 777-3500
Attorneys for Appellants Brian Connolly and Susan Connolly, Individually and as Co-Administrators of the Estate of Ethan P. Connolly

Dated: June 20, 2018

EFiled: Feb 28 2018 04:41PM EST
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Case No. N14C-08-006 FWW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRYAN CONNOLLY and SUSAN CONNOLLY, Individually and as Co-Administrators of the Estate of ETHAN P. CONNOLLY,	)	
	)	**C.A. No. N14C-08-006 FWW**
Plaintifffs,	)	
v.	)	
THETA CHI FRATERNITY, INC. and ALPHA XI CHAPTER OF THE UNIVERSITY OF DELAWARE, Individually and as a chapter and agent of the Theta Chi Fraternity, ALPHA EPSILON PHI Sorority, Individually and t/a PHI CHI CHAPTER, UNIVERSITY OF DELAWARE, Individually and as agent of ALPHA EPSILON PHI Sorority, EXECUTIVE BANQUET & CONFERENCE CENTER, CAPOZZOLI CATERING OF DELAWARE, INC., a Delaware Corporation, PLUMBERS & PIPEFITTERS LOCAL NO. 74, ET. AL. and THE PLUMBERS & PIPEFITTERS SOCIAL CLUB,	)	
Defendants.	)	

Submitted: November 28 and 29, 2017
Decided: February 28, 2018

MEMORANDUM OPINION AND ORDER

Upon Defendant Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter's Motion for Summary Judgment Based upon Lack of Duty:
GRANTED.
Upon Defendant Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter's Motion for Summary Judgment Based upon Ethan Connolly's Reckless Conduct and Comparative Negligence:
MOOT.
Upon Defendant University of Delaware's Motion for Summary Judgment:
GRANTED.
Upon Defendant Capozzoli Catering of Delaware, Inc.'s Motion for Summary Judgment:
GRANTED.
Upon Defendant Plumbers and Pipefitters Local No. 74's and Defendant The Plumbers and Pipefitters Social Club's Motion for Summary Judgment;
GRANTED.

Beverly L. Bove, Esquire, Vincent J. X. Hedrick, Esquire, Beverly L. Bove, Attorney at Law, 1020 W. 18th Street, P.O. Box 1607, Wilmington, Delaware 19899; Attorneys for Plaintiffs Bryan Connolly and Susan Connolly, Individually and as Co-Administrators of the Estate of Ethen P. Connolly.

Kevin J. Connors, Esquire, Marshall Dennehey Warner Coleman & Goggin, Nemours Building, 1007 N. Orange Street, Suite 600, P.O. Box 8888, Wilmington, Delaware 19899; Attorney for Defendant Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter.

William E. Manning, Esquire, James D. Taylor, Esquire, Danielle N. Petaja, Esquire, Saul Ewing Arnstein & Lehr LLP, 1201 N. Market Street, Suite 2300, Wilmington, Delaware 19801; Attorneys for Defendant University of Delaware.

Colin M. Shalk, Esquire, Brian V. Demott, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., 1007 N. Orange Street, Suite 1100, Wilmington, Delaware 19801; Attorneys for Defendant Capozzzoli Catering of Delaware, Inc.

Nancy Chrissinger Cobb, Esquire, Chrissinger & Baumberger, Three Mill Road, Suite 301, Wilmington, Delaware 19806; Attorney for Defendant Plumbers & Pipefitters Local No. 74 and Defendant The Plumbers and Pipefitters Social Club.

WHARTON, J.

I. INTRODUCTION

It falls to the Court to perform the unhappy task of bringing more bad news to people who have had far too much of that in recent years. On October 18, 2013, University of Delaware student Ethan P. Connolly ("Ethan"), the 19-year-old son of Bryan and Susan Connolly ("Connollys") was killed when he walked in front of a pickup truck. It was 12:31 a.m. It was dark. Ethan was crossing northbound Delaware Route 896 south of Newark. He was not crossing at the crosswalk with lighted pedestrian crossing signals approximately 90 feet from where he was struck. He was not wearing any reflective clothing, nor was he carrying a flashlight. Most significantly, Ethan was grossly impaired due to acute alcohol intoxication. At autopsy, he had blood alcohol concentrations of 0.232 g/dl (femoral blood), 0.227 g/dl (vitreous humor) and 0.304 g/dl (urine). He tested positive for marijuana.

Ethan had been invited to an off-campus sorority "crush" party held at a banquet facility not far from where he died. The facility was operated by a catering company and owned by a labor union. Members of the union's social club served as bartenders. Bus transportation was provided by the sorority to and from the event. Ethan was killed prior to the busses departing from the event. Ethen had been drinking before the event.

Ethan's parents have brought this wrongful death suit against the University of Delaware ("University"), the sorority and its local chapter, Alpha Epsilon Phi

("Sorority"), the caterer, Capazzoli Catering of Delaware, Inc. ("Capozzoli"), and the union and its social club, Plumbers & Pipefitters Local No. 74 ("Local 74") and The Plumbers & Pipefitters Social Club ("Social Club").[1] The Connollys allege that each defendant owed a duty to Ethan, breached that duty, and the breach of the duty was the proximate cause of Ethan's death. All defendants have moved for summary judgment. Themes common to each motion are that the movant did not owe a duty to Ethan, did not breach any duty it allegedly owed him, and Ethan's conduct was the proximate cause of his death, not anything the movant did or did not do. After carefully considering all of the parties' submissions and arguments, the Court finds that on the night of his death, none of the defendants owed Ethan the duty the Connollys allege each owed to him. None of the defendants breached any claimed duty to Ethan and no action or inaction on the part of any defendant was a proximate cause of Ethen's death. The sad and inescapable truth is that Ethan, and only Ethan, was responsible for his own death. Accordingly, applying Superior Court Civil Rule 56, all of the motions for summary judgment are **GRANTED** with the exception of the Sorority's motion based on Ethan's reckless conduct and comparative negligence, which is **MOOT.**

[1] All other defendants have been dismissed.

II. FACTUAL AND PROCEDURAL CONTEXT

The University of Delaware prohibits most possession, use, or consumption of alcohol on-campus.[2] Student organizations may serve alcohol at on-campus functions or events but are required to obtain the explicit, prior approval of the Director of the University Student Centers.[3] As a result, many students and student organizations host events off-campus in order to consume alcohol. In light this practice, the University warned:

> The University accepts no responsibility for the possession, use, consumption, manufacture, sale, or distribution of alcoholic beverages by students off-campus, including at events or functions sponsored in whole or in part by one or more student organizations or individuals. A student hosting or attending an off-campus function should be aware of the applicable laws regarding alcohol and should be aware that the University may also pursue student conduct charges for such behavior.[4]

In the fall of 2013, Ethan Connolly was a 19-year-old sophomore at the University of Delaware.[5] On the evening of October 17, 2013, the Sorority hosted an off-campus "crush" party[6] at the Executive Banquet & Conference Center

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[2] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267, Ex. 20 at 11-12.
[3] *Id.* at 11.
[4] *Id.* at 12-13.
[5] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 4.
[6] The "crush" party was a social function held by the Sorority where members were permitted to invite either one or two guests as a date to the invitation only event.

("Banquet Center") south of Newark, Delaware.[7] Ethan was invited to attend the crush party by Sorority member Stephanie Auerbach ("Stephanie").[8]

The Banquet Center is owned by Local 74.[9] At the time of the crush party, Capozzoli was a tenant of Local 74 and operated a catering business out of the Banquet Center.[10] Local 74 maintained the sole liquor license for the Banquet Center.[11] The Social Club, an affiliate of - but a separate legal entity from - Local 74, was solely responsible for distributing any and all alcohol from the bar of the Banquet Center.[12]

Ethan and Stephanie made plans to meet prior to the crush party to "pre-game."[13] Stephanie advised Ethan that she had tequila and eight beers for him.[14] Texts from Ethan confirm his attendance and consumption of alcohol at the pre-game.[15] The crush party began at approximately 10:30 p.m. and ended at approximately 12:30 a.m.[16] Ethan and Stephanie used a bus provided by the Sorority

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[7] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 4.
[8] *Id.*
[9] Def. Capozzoli Catering of Delaware, Inc. Op. Br. Mot. Summ. J., D.I. 257 at 6.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267, at 8. "Pre-gaming" is the name given to drinking before an event at which more drinking will occur.
[14] *Id.*
[15] *Id.*
[16] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 4.

to get from campus to the Banquet Center.[17] Once the partygoers boarded the buses on campus, and before they exited, the Sorority checked the partygoers for alcohol or drinking containers.[18]

Upon exiting the buses, partygoers were frisked by Social Club employees and females were bag checked by a Capozzoli employee.[19] After being checked, the partygoers formed two lines to enter the Banquet Center - one for those 21 and older and one for those under 21.[20] Attendees 21 and older showed identification to Capozzoli employees to procure a wristband, thereby verifying they were of legal drinking age, while those under 21 were allowed to enter without showing identification.[21] Inside the Banquet Center, two Social Club employees monitored the venue, the bathrooms, and the foyer leading into the venue, while three licensed Social Club employees staffed a cash bar.[22] The bartenders were instructed to card anyone who looked under age and to refuse service to anyone who appeared inebriated, additionally the bartenders were instructed never to serve more than one drink per patron at a time.[23]

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[17] Pltfs.' Ans. Br. Mot. Summ. J., D.I. 318 at 3.
[18] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 4-5.
[19] *Id.* at 5.
[20] *Id.* at 6.
[21] *Id.*
[22] Def. Capozzoli Catering of Delaware, Inc. Op. Br. Mot. Summ. J., D.I. 257 at 5.
[23] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 6.

Once Ethan arrived his activities and movements at the Banquet Center are unclear. No one has testified seeing Ethan attend the crush party, drinking any alcohol at the crush party, or knowing why he left the crush party and was walking in the roadway.[24]

At approximately 12:31 a.m., Linwood McLean was driving northbound on Route 896.[25] At that moment, Ethan and two other males - Daniel Bernstein and David Muir - were crossing the highway (away from the Banquet Center.)[26] None of the men was wearing any reflective material or carrying any type of flashlight or other lighting device, and as they crossed in front of McLean's vehicle, the left side of the vehicle collided with Ethan and Bernstein.[27] As the buses left the party to return to campus, attendees riding the buses saw Ethan lying on the ground after he was hit.[28] Ethan was pronounced dead at 12:53 a.m. on October 18, 2013.[29]

The police report indicates that the roadway was dark but there was a lighted pedestrian crosswalk approximately 90 feet from the collision scene.[30] Additionally, at autopsy Ethan's blood alcohol concentrations were 0.232 g/dl (femoral blood),

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[24] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267 at 8-9.
[25] *Id.* at 9.
[26] *Id.*
[27] *Id.* at 10.
[28] Pltfs.' Ans. Br. Mot. Summ. J., D.I. 316 at 7.
[29] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267 at 10.
[30] *Id.*

0.227 g/dl (vitreous humor), and 0.304 g/dl (urine).[31] His urine tested positive for the presence of cannabinoids.[32] He was not wearing a wristband.[33]

On November 29, 2016, the Connollys filed their Third Amended Complaint ("TAC") against Defendants for the wrongful death of Ethan Connolly.[34] All Defendants filed Motions for Summary Judgment. The Connollys responded opposing each Defendant's Motion for Summary Judgment. The parties appeared before the Court for oral argument on November 28 and 29, 2017.

III. STANDARD OF REVIEW

Superior Court Civil Rule 56(c) provides that summary judgment is appropriate when "there is no genuine issue of material fact...and the moving party is entitled to judgment as a matter of law.[35] The moving party initially bears the burden of establishing both of these elements; if there is such a showing, the burden shifts to the non-moving party to show that there are material issues of fact for resolution by the ultimate fact-finder.[36] The Court considers the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" in determining whether to grant summary judgment.[37] Summary

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[31] *Id.* at 11
[32] *Id.*
[33] Def. Capozzoli Catering of Delaware, Inc. Op. Br. Mot. Summ. J., D.I. 257, at 6.
[34] D.I. 198.
[35] Del. Super. Ct. Civ. R. 56(c).
[36] *See, Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citations omitted).
[37] Del. Super. Ct. Civ. R. 56(c).

judgment will be appropriate only when, upon viewing all of the evidence in the light most favorable to the non-moving party, the Court finds that there is no genuine issue of material fact.[38] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts to clarify the application of the law to the circumstances," summary judgment will not be appropriate."[39] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[40]

IV. THE PARTIES' CONTENTIONS

A. The Sorority.

The wrongful death claim against the Sorority alleges that both the national sorority and its local chapter owed a duty to Ethan to manage and oversee the local chapter's operations and the activities of its members as well as the provision and use of alcohol in connection with the crush party in a "reasonably prudent manner and/or assumed such a duty."[41] Count III of the TAC alleges that the Sorority negligently breached its duty to Ethan in that it: 1) relied on underage members who had themselves taken part in activities involving alcohol and who had taken "oaths

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[38] *Singletarry v. Amer. Dept. Ins. Co.* 2011 WL 607017 at *2 (Del. Super.) (citing *Gill v. Nationwide Mut. Inc. Co.*, 1994 WL 150902 at *2 (Del. Super.)).
[39] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69, (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).
[40] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[41] TAC, D.I. 198 at Counts III, IV.

of secrecy and loyalty to the brotherhood [sic], to manage the local sorority and its activities and to manage its risk management policies;" 2) failed to provide effective supervision and control over the local sorority's officers and members and pledge activities of the local sorority; 3) failed to implement reasonable measures to enforce risk management policies prohibiting the use of alcohol during all activities; 4) failed to provide reasonable safeguards and restrictions to prevent underage drinking and excessive drinking and supervision of underage persons serving alcohol to others; 5) failed to implement reasonable measures to prohibit the excessive consumption of alcohol at the crush party; 6) failed to implement reasonable measures to enforce state law and University and Sorority policies against underage drinking and hazing; 7) failed to implement reasonable measures to stop underage drinking and hazing which it knew or should have known were occurring at the local sorority; 8) failed to discipline local sorority members for engaging in underage drinking and alcohol related initiation activities; 9) failed to train local sorority members on risk management and various other policies and procedures; 10) delegated the non-delegable duty of safety to others; 11) failed to assure that Ethan returned to campus on the bus on which the Sorority transported him to the crush party; 12) failed in its duty under *DiOssi v. Maroney*[42] to anticipate that Ethan might consume beverages and thereafter be exposed to hazards; 13) pursuant to *Furek v. University of*

[42] 584 A.2d 1361 (Del. 1988).

Delaware,[43] failed in its duty to Ethan to exercise reasonable care in transporting him to the Banquet Center by completing the task of returning him to campus; and 14) was otherwise negligent.[44]

In Count IV the TAC alleges that the Sorority was wanton, willful, and/or reckless in that the Sorority: 1) knew or should have known of the "unparalleled dangers associated with the 'big brother' [sic] and family drink ritual, of hazing, alcohol abuse, and inept risk and crisis management within fraternal [sic] organizations;"[45] 2) upon information and belief, had available to it information about the risks of alcohol at sorority events; 3) upon information and belief, knew that its risk and crisis management policies were not working; 4) upon information and belief, knew of and failed to supervise or implement reasonable controls over the traditions of the local sorority, including excess alcohol consumption, hazing, and other activities that resulted in Ethan's death; and 5) breached its duty to Ethan by its acts and omissions in instituting and enforcing wholly inadequate and dangerous policies and procedures for managing the local sorority.[46]

The Sorority advances two arguments in its Opening Brief in support of its Motion for Summary Judgment Based on Lack of Duty. First, it argues that the

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[43] 594 A.2d 506 (Del. 1991).
[44] TAC, D.I. 198 at Count III.
[45] *Id.* at Count IV.
[46] *Id.*

Sorority is entitled to summary judgment as a matter of law because the Connollys are unable to make out a *prima facie* case against it because they have no qualified and reliable opinion of an expert establishing a standard of care.[47] Second, it argues that it is entitled to summary judgment because it owed no duty to Ethan.[48]

In its Answering Brief in Opposition to the Sorority's Motion for Summary Judgment, the Connollys argue that their two experts, Russell Kolins and Norman J. Pollard, Ed.D., are qualified experts who have articulated the appropriate standard of care for the Sorority.[49] They further argue that where there is a logical basis for the testimony, the credibility and weight of the testimony of expert witnesses is to be determined by the jury.[50] The Connollys assert that the Sorority owed a duty to Ethan, notwithstanding the absence of Dram Shop liability, based on business premises liability and common law tort liability, including under Sections 284, 302, 323 and 324 of the Restatement (Second) of Torts.[51]

In reply, the Sorority argues that the Connollys fail to address the merits of its contentions regarding the opinions of Mr. Kolins and Dr. Pollard and only address their expert witnesses' qualifications.[52] Further, the Sorority argues it cannot

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[47] Def. Alpha Epsilon Phi Sorority Op. Br. Mot. Summ. J., D.I. 271 at 11.
[48] *Id.* at 13.
[49] Pltfs.' Ans. Br. Mot. Summ. J., D.I. 318 at 11-14.
[50] *Id.*
[51] *Id.* at 15-34.
[52] Def. Alpha Epsilon Phi Reply Br. Mot. Summ. J., D.I. 338 at 1-2.

have any premises liability since nothing, including Ethan's fatality, occurred on any property of the Sorority.[53] Finally, to the extent it voluntarily undertook any duty under the Restatement (Second) of Torts to Ethan to provide transportation to and from the party, the Sorority never breached that duty because Ethan, voluntarily and without notice, left the party prior to its conclusion and before the departure of the return transportation.[54]

B. The University.

Count V of the TAC alleges that the University negligently caused Ethan's death.[55] In that count, the Connollys allege that the University owed the same duty to Ethan that the Sorority did and negligently breached that duty in virtually all of the same ways that they allege that the Sorority breached its duty to Ethan.[56] They do not allege business premises liability against the University, however. Additionally, they allege that the University failed to implement reasonable safety procedures for off campus events.[57] Count VI alleges wanton, willful, and/or reckless misconduct on the part of the University.[58] The language of Count VI tracks the language of Count IV which alleges wanton, willful and reckless misconduct on

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[53] *Id.* at 4.
[54] *Id.* at 5-8.
[55] TAC, D.I. 198 at Count V.
[56] *Id.*
[57] *Id.*
[58] *Id.* at Count VI.

the part of the Sorority.[59] In addition, Count VI alleges that the University, by acts and omissions in encouraging off campus events, created an unreasonable risk of injury or death to Ethan.[60]

In its Motion for Summary Judgment, the University asserts that it had no duty to Ethen since the doctrine of *in loco parentis* no longer applies in Delaware, and *Furek* does not suggest any duty to Ethan.[61] Moreover, the Connollys cannot; 1) identify a standard of care accepted throughout the higher education community; 2) identify an act or omission by the University that breached the applicable standard of care and was the proximate cause of Ethen's death; or 3) explain why Ethan was not solely responsible for his own death.[62]

In their Answering Brief in Opposition the University's Motion for Summary Judgment, the Connollys advance the same arguments they made regarding Mr. Kolins and Dr. Pollard's testimony as to standard of care that they made in opposing the Sorority's motion.[63] The Connollys further assert that the University owed a duty to Ethan based on common law principles.[64] They also adopt and incorporate their arguments in opposition to the motions for summary judgment of Capozzoli

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[59] *Id.*
[60] *Id.*
[61] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267 at 19.
[62] *Id.* at 2.
[63] Pltfs.' Ans. Br. Mot. Summ. J., D.I. 321at 19-22.
[64] *Id.* at 23-30.

and Local 74.[65] Finally, they argue that the question of Ethan's comparative negligence is one for the jury.[66]

The University makes five points in reply. First, it points out that one of the cases the Connollys rely upon to establish a duty to Ethan on the part of the University, *Marshall v. University of Delaware*,[67] was decided prior to the Supreme Court's decision in *Furek,* and a different result obtained for the University's second motion for summary judgment decided after *Furek.*[68] *Furek* and subsequent cases make it clear that the University is not responsible for injuries occurring at off-campus student social events.[69] Second, the University disputes the notion that the issues raised in its motion are fact issues for the jury instead of legal issues for the Court, arguing that the determination of whether a duty exists is a legal question.[70] Third, the University argues that Dr. Pollard fails to identify a source of the duty he claims the University owed to Ethen.[71] Fourth, the alleged breach of the purported

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[65] *Id.* at 28.
[66] *Id.* at 30-35.
[67] 1986 WL 11566 (Del. Super.) (cited by the Connollys in their Answering Brief, D.I. 321 at 26-27, Ex. CC, as 1986 Del. Super. Lexis 1374 (Del. Super. Oct. 8, 1986)).
[68] Def. University of Delaware Reply Br. Mot. Summ. J., D.I. 338 at 5-6; *See, Marshall v. University of Delaware,* 633 A.2d 370 (Table) (Del. 1993); 1993 WL 385114 (Del.).
[69] *Id.* at 6.
[70] *Id.* at 7.
[71] *Id.* at 8-10.

duty owed by the University to Ethan was not the proximate cause of his death, and, fifth, Ethan's own choices were the proximate cause of his death.[72]

C. Capazzoli.

The Connollys allege in the TAC that Capozzoli's "negligent, reckless, willful and wanton, and intentional conduct" was a proximate cause of Ethan's death.[73] Specifically, they allege that Capozzoli: 1) failed to properly maintain, secure, and monitor the Banquet Center; 2) failed to monitor, secure, or otherwise protect its underage patrons from consuming alcohol at the Banquet Center; 3) failed to adequately inspect, monitor, and supervise the Banquet Center to ensure that underage patrons were not being served alcohol; 4) failed to stop consumption of alcohol by underage patrons who were being served alcohol at the Banquet Center; 5) failed to train and supervise its employees to ensure that underage patrons were not being served alcohol; 6) hired incompetent, negligent, and reckless employees to monitor, ensure, and inspect the Banquet Center to prevent underage patrons from being served alcohol; 7) delegated its non-delegable duty of safety to others; 8) failed to prevent Ethan from leaving the Banquet Center on foot, thereby creating an unreasonable risk of his injury and death; 9) failed in its duty under *DiOssi* to anticipate that Ethan might consume alcohol and thereafter be exposed to hazards;

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[72] *Id.* at 10-12.
[73] TAC, D.I. 198 at Count VII.

10) pursuant to *Furek,* failed in its duty to Ethan to exercise reasonable care in transporting him to the Banquet Center by completing the task of returning him to campus; and 11) was otherwise negligent.[74]

Capozzoli advances two primary arguments in support of its Motion for Summary Judgment, both based on its position that it owed no duty to Ethan. First, it argues that one of the Connollys' expert witnesses impermissibly offered a legal opinion it had a legal duty to Ethen, when in fact, it did not.[75] Second, it argues that the Connollys' attempt to impose a non-delegable duty on it amounts to an attempt to circumvent the Delaware Supreme Court's long history of decisions rejecting Dram Shop and Social Host liability.[76] Capozzoli's Opening Brief contains an extended exegesis of the Delaware Supreme Court's case law on Dram Shop and Social Host liability in support of its argument that Delaware courts are clear that no viable cause of action exists against a commercial dispenser of alcohol or a social host for an injury suffered or inflicted by an intoxicated person.[77] Capozzoli also joins in the Motions for Summary Judgment of all Co-Defendants.[78] Specifically it

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[74] *Id.*
[75] Def. Capozzoli Catering of Delaware, Inc. Op. Br. Mot. Summ. J., D.I. 257 at 10.
[76] *Id.* at 11-27.
[77] *Id.* at 26.
[78] D.I. 281.

joins the University's motion in its entirety, Section 2 of the Sorority's motion based on lack of duty[79] and Sections 1,2, and 3 of Local 74's motion.[80]

Although they acknowledge that Capozzoli is not liable for Ethan's death under a theory of Dram Shop liability, the Connollys maintain that Capozzoli is liable for Ethan's death based on business premises liability, social host liability and common law restatement of torts liability adopted in Delaware.[81] Further, they incorporate the positions they have taken in opposition to the motions for summary judgment of the Sorority, the University, and Local 74.[82]

Capozzoli rejects the Connollys' argument that it is liable for Ethan's death under either § 324 or § 323 of the Restatement (Second) of Torts as such an argument constitutes an impermissible end run around the Delaware Supreme Court's refusal to impose Dram Shop and Social Host liability.[83] Further, Capozzoli insists that it

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[79] Section 2 of the Sorority's motion argues that summary judgment is appropriate because the Connollys are unable to make out a *prima facie* case as to the applicable standard of care in the absence of a qualified and reliable expert opinion. *See* D.I. 271 at 11-13.

[80] Those sections argue that there is no Dram Shop liability in Delaware (Section 1), a premises liability claim fails as a matter of law (Section 2), and the claims of the estate also fail as a matter of law (Section 3). *See* Plumbers & Pipefitters Local No. 74 Mot. Summ. J., D.I. 259.

[81] Pltfs.' Ans. Br. Mot. Summ. J., D.I. 314 at 1.

[82] *Id.* at 24.

[83] Def. Capozzoli Catering of Delaware, Inc. Reply Br. Mot. Summ. J., D.I. 327 at 3-8.

cannot be liable under a premises liability theory because there was no property nexus to Ethan's injury.[84]

D. Local 74 and the Social Club.

The wrongful death claim against Local 74 and the Social Club is found at Count VIII if the TAC.[85] It is identical to the claim against Capozzoli.[86]

Like Capozzoli, Local 74 argues in its Motion for Summary Judgment that the absence of Dram Shop liability in Delaware precludes liability as to it.[87] It also maintains that it has no premises liability as a landholder because Ethan was not killed at the Banquet Center.[88] Finally, it argues that the estate's claims fail as a matter of law because Ethan was killed instantly.[89]

The Connollys again acknowledge the absence of Dram Shop liability in Delaware, but maintain nonetheless that Local 74 is liable for Ethan's death on premises liability and common law tort theories.[90] They also incorporate their arguments in opposition to the motions for summary judgment of the Sorority, the University and Capozzoli.[91] Lastly, they point out that no survivorship claim was

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[84] *Id.* at 9-11.
[85] TAC, D.I. 198 at Count VIII.
[86] *Id.* at Count VII.
[87] Def. Plumbers & Pipefitters Local No. 74 Op. Br. Mot. Summ. J., D.I. 259 at 13.
[88] *Id.* at 19.
[89] *Id.* at 27.
[90] Pltfs.' Ans. Br., D.I. 287 at 9-15.
[91] *Id.* at 15.

plead on behalf of Ethan's estate, so there is no predicate upon which to grant summary judgment as to the non-existent survivorship claim, a point later acknowledged at argument by Local 74 and the Social Club.[92]

Like Capozzoli, Local 74 and the Social Club see the Connollys' negligence claims as nothing more than Dram Shop claims which are not recognized under Delaware law.[93] They also deny premises liability for the same reason as Capozzoli – the fact that Ethan was not killed on the premises of the Banquet Center.[94]

V. DISCUSSION

Five general points of contention emerge from the parties' briefs and oral arguments: 1) whether any or all of the defendants had a duty to Ethen based on a theory of premises liability; 2) whether Delaware's prohibition of Dram Shop and Social Host liability necessarily forecloses all of the Connollys' tort liability claims; 3) whether any or all of the defendants had a duty to Ethan based on common law tort principles; 4) whether, to the extent any or all defendants had a duty to Ethan, that duty was breached; and 5) if any duty to Ethan was breached, whether the breach of that duty was the proximate cause of Ethan's death. The Court address each of these issues in turn, but does not address issues argued by the Sorority and the

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[92] *Id.* at 21.
[93] Def. Plumbers & Pipefitters Local No. 74 Reply Br. Mot. Summ. J., D.I. 336 at 7-13.
[94] *Id.* at 14-15.

University relating to the Connollys' expert witnesses, Mr. Kolins and Dr. Pollard. While the Court has some sympathy for the positions of the Sorority and the University, the issues raised concerning the Connollys' experts are better resolved in the context of the motions *in limine*, which are now moot in light of the Court's decisions on the motions for summary judgment.

Additionally, it is necessary to address the state of the factual record about what Ethan did or did not do at the crush party. The Connollys provided an interrogatory answer in which they identified a number of people whom they represent have knowledge that Ethan was inside the Banquet Center and consumed alcohol at the event.[95] None of these witnesses was deposed by any party and the Connollys have not provided affidavits from any of them. The Connollys have proffered neither the substance, nor the details of any particular potential witness' testimony. Information such as how long Ethan remained at the party, how much he drank there, how he procured the alcohol, whether he had a wristband or not, and if so, how he obtained it, how visibly intoxicated he appeared at the party, when and how he left the party, who, if anyone observed him leave the party, and what he did after he left the party before he was killied is completely absent from the record. In short, the most the Connollys arguably can be said to have established as far as a factual record is that Ethan went to the crush party on a bus provided by the Sorority,

[95] Pltfs.' Ans. Br., D.I. 314 at 8, Ex. M at Ans. to Interrogatory 1.

went inside the Banquet Center, consumed an unknown amount of alcohol procured by unknown means, and left sometime before the party ended. In contrast, a strong argument can be made that the Connollys have not established even that much, since those facts are merely lawyers' representations about what potential witnesses would say. Nevertheless, the Courts accepts that the Connollys' representations, limited as they are, are true for purposes of deciding these motions.

Unfortunately for the Connollys, the near total lack of detail about what Ethan did at the crush event, and more importantly, what any of the defendants did at the crush event, leaves the allegations of the TAC either without evidentiary support or without relevance. These factual deficiencies otherwise might set the Court off on the task of parsing the minutiae of the TAC, while applying the requisite inferences in favor of the Connollys, in what likely would be a futile search for potential genuine issues of material fact for a jury's consideration. Ultimately, however, that task is unnecessary because it is clear to the Court that under no theory of liability advanced by the Connollys did any defendant breach any duty it owed to Ethan. Moreover, even if any defendant breached a duty it owed to Ethan, the proximate cause of Ethan's death was his own conduct, not the breach of a duty by any defendant.

A. All Claims Based on Premises Liability Fail.

It seems tautological to say that in order for a business to be liable to a plaintiff on a theory of premises liability, the claimed injury must have occurred on the business' premises. Indeed, Delaware law is just so. In *Rogers v. Christiana School District*,[96] the issue before the court was whether the school district could be liable for the off-campus suicide of a student. There, the Delaware Supreme Court noted that Section 323 of the Restatement (Second) of Torts, which sets out the requirements for an assumed duty of care for another, such as one assumed by a business, only applies the duty of care to a person physically on the premises of the entity owing the duty.[97] Yet, the Connollys argue business premises liability claims against the Sorority, Capozzoli, Local 74 and the Social Club, and curiously, even the University (by incorporating the arguments they made in their opposition to the motions for summary judgment of Capozzoli and Local 74 and the Social Club.) These claims fail because Ethen was killed on Route 896, a public roadway, and not on the property of any defendant.

The cases cited by the Connollys to support their premises liability claims – *DiOssi, Furek,* and *Jardel, Inc. v. Hughes*[98] - do not support their position. Each of those cases addresses the defendants' liability in the context of injuries occurring on the defendants' property.

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[96] 73 A.3d 1 at 7 (Del. 2013).
[97] *Id.* at 8-9.
[98] 523 A.2d 518 (Del. 1987).

Plaintiff Dion DiOssi appealed the Superior Court's decision granting the defendants' summary judgment motion.[99] The defendants were social hosts who employed the plaintiff to provide valet parking services for a large party at their house.[100] Hundreds of people attended the party, many of them too young to drink legally.[101] After the party, an intoxicated, underage party-goer struck the plaintiff while still on the defendants' property.[102] The Superior Court held that the defendants, as social hosts, had no duty to provide safe premises to the plaintiff.[103] The Supreme Court reversed in what it described as a "novel" holding, ruling that the defendants "had a duty to provide a reasonably safe work place for the plaintiff who was on the premises as a business visitor."[104] The Court cautioned, however:

> Because our holding sustaining a claim against a social host is a novel one, we deem it important to emphasize what we do not decide. Our holding may not be read to extend the liability of a social host for the injuries of other guests which are caused by tortious conduct attributable to the social host's dispensing of alcoholic beverages.
>
> Nor do we pass upon the liability of the social host (a) to third parties injured off the premises or (b) for the tortious acts of adult guests on the premises. Recovery in such instances implicates the extension of the liability of social hosts arising out of the mere dispensing of alcoholic beverages in the absence of a property nexus or the

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[99] *DiOssi,* 548 A.2d at 1362.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 1263.
[103] *Id.* at 1362.
[104] *Id.* at 1368-89.

> involvement of minors. We leave such considerations to another day.[105]

DiOssi, then, recognizes a cause of action against a social host (and, presumably, a dram shop) on a premises liability theory, but not on a social host or dram shop theory. That cause of action must arise from an injury sustained on the defendant's property, because the duty of the defendant to the plaintiff only extends to providing safe premises while the plaintiff is present. The fact that Ethan was killed away from the Banquet Center means that *DiOssi* offers no support for any theory of premises liability against any defendant.

Furek was an action brought by a student for injuries sustained in a fraternity hazing incident at the University.[106] Furek suffered first and second degree chemical burns when a lye-based liquid oven cleaner was poured on his face, back, and neck during a fraternity "Hell Night" initiation.[107] After a trial at which the University and an individual fraternity brother were found liable for the Furek's injuries, the Superior Court granted judgment notwithstanding the verdict in favor of the University, leaving the individual defendant liable for the entire $30,000.00 award.[108] The primary issue on appeal was what duty the University had, if any, to

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[105] *Id.* at 1369.
[106] *Furek,* 594 A.2d at 509.
[107] *Id.* at 509-10.
[108] *Id.* at 509.

protect Furek from the hazing activities of the fraternity and its members.[109] The Supreme Court considered and rejected at least two theories of liability against the University. Specifically, it rejected a theory of liability based on § 319 of the Restatement (Second) of Torts that the University had a duty to Furek based on a special relationship arising out of its responsibility to control third persons having dangerous propensities.[110] It also rejected a theory of liability based on Restatement § 324A relating to assumed duties since the duty the University assumed "to regulate and enforce hazing was not directed to, or intended as a substitute for, the duty owed by the fraternity to Furek."[111] The University's duty of rule promulgation and enforcement was separate from a duty the fraternity may have had to Furek.[112]

Nevertheless, the Supreme Court found that the University did have a duty to Furek based on two separate theories of liability. The Court held that the University had assumed a duty of protection based on Restatement § 323, which addresses the duty owed by one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection.[113] Whether any defendant had such a duty toward Ethan is discussed below in Section V. C. The other duty the University was found to owe Furek was based on its status as the owner of the land

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[109] *Id.* at 514.
[110] *Id.* at 519.
[111] *Id.* at 520.
[112] *Id.*
[113] *Id.*

on which the fraternity where the incident occurred was located. The University had a duty to regulate and supervise foreseeable dangerous activities on its property, a duty which extended to the negligent or intentional conduct of third parties, but was limited to instances where the University had control.[114] It is clear, therefore, that *Furek* cannot justify any theory of liability against any defendant here based on premises liability, since Ethan was killed elsewhere.

Finally, the third case cited by the Connollys, *Jardel*, is similarly unhelpful. The plaintiff in *Jardel* was an employee of a tenant in a shopping mall and was abducted and raped while leaving her employment.[115] The jury awarded damages against both the owner of the mall, Jardel Co., Inc., and its parent company in not providing adequate security in the mall parking lot.[116] At trial, Jardel acknowledged that the plaintiff was the beneficiary of its rental agreement with her employer and that the attack occurred on leased premises, but denied that it owed plaintiff a duty to provide for her safety.[117] The Supreme Court held, based on Restatement § 344, that while Jardel was not an insurer of public safety, it had a residual obligation of reasonable care to protect business invitees from the criminal acts of third persons.[118] *Jardel,* however, cannot be read to extend that residual duty of a possessor of land

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[114] *Id.* at 522.
[115] *Jardel,* 523 A.2d at 521.
[116] *Id.* at 521-22.
[117] *Id.* at 523.
[118] *Id.* at 525.

to protect a business invitee from injuries sustained once the invitee has left the business premises, especially where the former invitee's injuries were occasioned by that person's own behavior.

B. Delaware's Prohibition on Dram Shop and Social Host Liability Forecloses All of the Connollys' Tort Liability Claims Where Ethan's Intoxication Forms the Basis of the Defendant's Liability.

Delaware, despite repeated attempts to have it do so, has not recognized, either legislatively or judicially, a cause of action based on Dram Shop or Social Host liability. On that point, all parties are agreed, making unnecessary a deep dive into Dram Shop and Social Host jurisprudence. Nonetheless, the Connollys do claim common law tort liability against each defendant. In order to understand why the absence of a Dram Shop Act or Social Host Act is such an impediment to liability here, it is necessary to look at the rationale for the exclusion.

In *Wright v. Moffitt*[119] the issue on appeal after the Superior Court had dismissed the complaint was whether a customer who purchased and drank alcohol in a tavern for about six hours, apparently being served even after he was intoxicated, had a cause of action, either at common law or statutorily, against the tavern owner for injuries he sustained when he left the bar on foot and was struck by an automobile crossing the highway outside of the tavern.[120] The Delaware Supreme Court held

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[119] 437 A.2d 554 (Del. 1981).

[120] The Court notes that the relevant facts in *Wright,* while approximating the relevant facts here, arguably present an even stronger case for liability. Due to the

that no such cause of action existed in Delaware, noting that "generally, the common law did not enforce a cause of action against a tavern owner for personal injury to a patron (or third person) resulting from or 'caused' by the voluntary intoxication of the patron."[121] The Court quoted with approval, the Maryland Court of Appeals:

> Apart from statute, the common law knows no right of action against a seller of intoxicating liquors, such as, for "causing" intoxication of the person whose negligent or willful wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.[122]

Put another way, it is the consumption of alcohol, not the sale of alcohol that is the proximate cause of any injuries sustained or caused by the intoxicated person.[123] The Supreme Court also declined to recognize a right of action based on violations of the Alcoholic Beverage Control Act since the legislative purpose of its relevant sections was to "protect the public, not to protect one who has drunk alcoholic beverages from the consequences of his own intoxication." [124]

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procedural posture in *Wright,* the Court was required to take as true the allegation that Wright became intoxicated in the tavern. Here, while the Court must view the evidence in the light most favorable to the Connollys, far fewer facts are in the record to support an inference that Ethan became intoxicated at the crush party.

[121] *Wright,* 475 A.2d at 555.

[122] *Id.* (quoting *State v. Hatfield,* 78 A.2d 754, 756 (Md. Ct. App. 1951)).

[123] *Wright,* 437 A.2d at 555.

[124] *Id.* at 557.

In the nearly four decades since *Wright* was decided, neither the Supreme Court, nor the General Assembly has altered these basic principles. Whether the intoxicated person injured a third party after drinking at a bowling alley,[125] the intoxicated person was a minor who injured a third person after leaving a tavern,[126] the tavern-defendant undertook a duty not to leave a helpless intoxicated person, who later injured himself, in an unsafe position by taking physical control of that person,[127] or the intoxicated tortfeasor had consumed alcohol at the home of a social host as well as a tavern,[128] the immunity of those who served alcohol to either an intoxicated patron or guest (regardless of whether the patron or guest was a minor) was affirmed.[129]

Of particular relevance here is the Supreme Court's refusal in *McCall v. Village Pizza* to recognize a cause of action based on Restatement (Second) of Torts § 324[130] where the Court rejected an indirect attack on Dram Shop immunity through

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[125] *Samson v. Smith,* 560 A.2d 1024 (Del. 1989).
[126] *Oakes v. Megaw,* 656 A.2d 914 (Del. 1989).
[127][127] *McCall v. Villa Pizza, Inc.* 636 A.2d 912 (Del. 1994).
[128] *Shea v. Matassa,* 918 A.2d 1090 (Del. 2007).
[129] The fact that the intoxicated guest who caused the plaintiff's injury in *DiOssi* was a minor was irrelevant to the court's determination that the defendants had a duty to provide a safe premises to DiOssi. The same duty would have obtained had the tortfeasor been an adult.
[130] Section 324 provides:

Duty of One Who Takes Charge of Another Who is Helpless

the application of § 324 to commercial vendors of alcoholic beverages.[131] The Court noted that it has "consistently held that there is no statutory or common law cause of action by one injured off the tavern premises by an intoxicated person, whether the injured person be the patron or a third-party."[132] "Positing tavern owner liability under § 324 implicates the same policy considerations we have repeatedly held are within the province of the legislature."[133]

The Connollys allege that the Sorority either owed or assumed a duty to Ethen to manage and oversee the activities of the Sorority in a reasonably prudent manner in general, and in particular, with respect to events involving alcohol.[134] All of the alleged breaches of those alleged duties, except two involving transporting Ethen to and from the crush event, involve providing him with alcohol.[135] Dram Shop and Social Host immunity bars those alcohol related claims.

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
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> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
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> (b) the actor's discontinuing his aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him.

[131] *McCall,* 636 A.2d at 913-14.
[132] *Id.* at 913.
[133] *Id.* at 914.
[134] TAC, D.I. 198, Count III at ¶¶ 54,55.
[135] *Id.*, Count III at ¶ 56.

The Connollys allege that the University owed Ethen the same duties as the Sorority.[136] They also allege that the University breached those duties in the identical manner that they allege the Sorority breached them.[137] For obvious reasons, the University makes no claim of Dram Shop or Social Host immunity, but bases its Motion for Summary Judgment on other grounds which are discussed elsewhere.

The Connollys' claims against Capozzoli, Local 74, and the Social Club are identical.[138] The only duties they allege these three defendants owed to Ethan are the same duties they allege the Sorority and University owed him.[139] Most of the specific allegations that these defendants breached these duties are allegations that they failed to prevent minors from obtaining or consuming alcohol at the Banquet Center.[140] Again, these allegations run afoul of the defendants' Dram Shop immunity and are barred. The Connollys also claim that these defendants failed to properly maintain, secure and monitor their premises.[141] This claim fails for the same reason that all claims of premises liability fail – Ethen was not killed at the Banquet Center. Finally, the Connollys claim that these three defendants breached a duty to Ethen by failing to prevent him from leaving the Banquet Center and failing

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[136] *Id.*, Count V at ¶¶ 66,67.
[137] *Id.*, Count V at ¶ 68.
[138] *Id.*, Count VII at ¶ 79, Count VIII at ¶ 82.
[139] *Id.*, Count VII at ¶ 78, Count VIII at ¶ 81.
[140] *Id.*, Count VII at ¶ 79, Count VIII at ¶ 82.
[141] *Id.*

to ensure he returned to campus safely.[142] These claims are an attempt to impose liability based on the theory that these defendants assumed a duty of protecting Ethan from harm away from their premises. The Court views this argument as an impermissible attempt to circumvent Dram Shop immunity, something which Delaware has never permitted.

C. Defendants Owed Common Law Tort Duties to Ethen Only to the Extent They Assumed Such Duties.

It is clear that neither Capozzoli, Local 74, nor the Social Club assumed any duties toward Ethan for anything he did, or that happened to him, away from the Banquet Center. The University not only did not assume any duty to Ethan, it expressly disclaimed any duty toward students engaged in off-campus drinking activities, warning students that it refused to accept responsibility for the use or consumption of alcoholic beverages by students off-campus at events sponsored by student organizations.[143]

The Sorority, however, did undertake to provide transportation from campus to the Banquet Center and back to campus. In fact, the Sorority required attendees to ride the busses it provided. The Connollys argue that this duty assumed by the Sorority necessarily included a duty to ensure that Ethan got on the bus after the event. In *Furek,* the Supreme Court recognized that § 323 addresses the duty owed

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[142] *Id.*

[143] Def. University of Delaware Op. Br. Mot. Summ. J., D.I. 267, Ex. 20 at 11-12.

by one who "assumes direct responsibility for the safety of another through the rendering of services in the area of protection."[144] The service in the area of protection by which the Sorority assumed direct responsibility for Ethan's safety was transporting him to and from the event. The reason the Sorority provided transportation is obvious. It did not want impaired attendees (including Ethan) driving to and from the event, which was beyond reasonable walking distance from campus, thereby endangering themselves and others. Providing safe bus transportation was the extent of the duty the Sorority assumed.

D. No Defendant Breached a Duty to Ethan.

Having determined that the only Defendant owing a duty to Ethan that extended beyond the Banquet Center was the Sorority, the Court turns to the question of whether the Sorority breached that duty. In other words, did the Sorority breach the duty it assumed under § 323 to transport Ethen to and from the crush event safely? It did not. It is undisputed that Ethan was killed before the crush event ended and that the Sorority fulfilled its duty to provide transportation back to campus for all who remained at the party. This situation was not one where the Sorority left a grossly intoxicated Ethan behind at the Banquet Center. Nor was it one where the Sorority barred Ethan from getting on a return bus. It was Ethan's premature and volitional departure from the party that prevented him from taking advantage of the

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[144] *Furek,* 590 A.2d at 520.

transportation service that the Sorority had provided. No Sorority member did anything that increased the risk of harm to Ethan or prevented him from taking advantage of the transportation service that defined the responsibility for Ethan's safety assumed by the Sorority.[145] The Court simply does not accept, nor find any warrant for, the Connollys' contention that the duty the Sorority assumed extended to preventing Ethan from leaving the Banquet Center, ultimately perhaps to the extent of restraining him if necessary.

E. Ethan's Own Conduct Was the Proximate Cause of His Death.

The above discussion is arguably simply prologue to determining if the acts, or failures to act, of any defendant were a proximate cause of Ethan's death. No matter whether a defendant had a duty to Ethan, and no matter whether a defendant breached a duty to Ethan, if that breach was not a proximate cause of Ethan's death, no liability can be ascribed to that defendant.

To establish causation, the Connollys must prove that "a reasonable connection" exists "between the negligent act or omission of the defendant and the injury which the plaintiff has suffered," allowing for the possibility that there may be more than one proximate cause of an injury.[146] Delaware's '"time-honored definition of probable cause' has been the 'but for rule.'"[147] In Delaware, proximate

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[145] *See Jain v. State,* 617 N.W. 2d 293 (Iowa 2000).
[146] *Culver v. Bennett,* 588 A.2d 1094, 1097 (Del. 1991).
[147] *Id.* (quoting *Chudnofsky v. Edwards,* 208 A.2d 516, 518 (Del. 1965)).

cause is defined as "...the direct cause without which the accident would not have occurred. More fully stated, it is to be determined, on the facts, upon mixed considerations of logic common sense, justice, policy and precedent."[148]

"But for" proximate causation is not limitless, however. "A proximate cause is one which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred."[149] Juxtaposed, then, against the concept of "but for" proximate causation is the countervailing notion of remote, or intervening/superseding, causation. A prior and remote cause will not support liability if the remote cause:

> did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior of remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury even though such injury would not have happened but for such condition or occasion.[150]

While ordinarily questions of probable cause are to be submitted to the trier of fact for determination, that is so only if the inferences to be drawn from the undisputed material facts are reasonably capable of more than one conclusion.[151] Here, there can be but one conclusion of proximate cause. Informed by the

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[148] *Chudnofsky,* 208 A.2d at 518.
[149] *Duphilly v. Del. Elec. Coop., Inc.* 662 A.2d 821, 829 (Del. 1995) (Internal citations omitted; emphasis in original.).
[150] *McKeon v. Goldstein,* 164 A.2d 260, 262 (Del. 1960).
[151] *Id.*

understanding that the common law recognizes no relationship of probable between the seller of alcohol and one who commits a tort after consuming the alcohol, and that "human beings, drunk or sober, are responsible for their own torts," the Court finds that Ethan's own volitional conduct was the sole proximate cause of his death. Every untoward consequence that befell Ethan on the night he died was a direct result of his own volitional conduct. It is beyond dispute that the reason Ethan stepped in front of the pick-up truck that killed him was his own gross impairment. He was responsible for "pre-gaming" with beer and tequila before the crush event. He was responsible for drinking at the event. He was responsible for the high levels of alcohol in his system. He was responsible for the marijuana detected in his urine. He was responsible for leaving the Banquet Center before the party ended. He was responsible for foregoing the safety of bus transportation back to campus. He was responsible for attempting to cross Route 896 approximately 90 feet from the crosswalk with lighted pedestrian signals. He was responsible for attempting that crossing without a flashlight or reflective clothing. Any other interpretation of those facts in order to ascribe liability to any of these defendants would require a radical reframing of the Court's understanding of proximate cause.

VI. CONCLUSION

Therefore, for the reasons set forth above, and because there are no issues of material fact and each movant is entitled to judgment as a matter of law, Defendant

Alpha Epsilon Phi Sorority, Individually and t/a Phi Chi Chapter's Motion for Summary Judgment is **GRANTED.** Its Motion for Summary Judgment Based upon Ethen Connolly's Reckless Conduct and Comparative Negligence is **MOOT.** Defendant University of Delaware's Motion for Summary Judgment is **GRANTED.** Defendant Capozzoli Catering of Delaware, Inc.'s Motion for Summary Judgment is **GRANTED.** Defendant Plumbers and Pipefitters Local No. 74's and Defendant Plumbers and Pipefitters Social Club's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

Ferris W. Wharton, J.