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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,	:	Case No. 152, 2018
Plaintiffs Below-Appellants,	:	
v.	:	Court Below - Superior Court of the State of Delaware, in and for New Castle County
ALPHA EPSILON PHI SORORITY, Individually and t/a PHI CHI CHAPTER,	:	C.A. No. N14C-08-006 FWW
Defendant Below-Appellee.	:	

DEFENDANT BELOW-APPELLEE'S ANSWERING BRIEF

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Date: July 23, 2018

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Other Authorities

NATURE OF THE PROCEEDINGS

Plaintiffs, Bryan and Susan Connolly, individually and as co-administrators of the Estate of Ethan Connolly, filed this wrongful death action in the Superior Court on August 1, 2014 (A1). The Plaintiffs sued multiple Defendants,[1] alleging Dram Shop, Social Host, and related negligence claims. The claims arise out of the unfortunate death of Plaintiffs' Decedent, Bryan Connolly, a highly intoxicated, nineteen year old, University of Delaware student, who stepped in front of a motor vehicle on Route 896 in Newark, Delaware. The accident occurred on October 18, 2013 at approximately 12:30 a.m.

Prior to this accident, Mr. Connolly was allegedly a guest of a sorority member at a "Crush" Event organized by the Sorority (the "Event"). The Event was held at the Executive Banquet Center in Newark, Delaware. Transportation to and from the Event was arranged by the Sorority, but Mr. Connolly voluntarily, and inexplicably, left the Event on foot before the busses departed. No one knows why he left, nor did he tell notify any Sorority member that he was leaving.

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[1] Specifically, Plaintiffs sued Theta Chi Fraternity, individually and t/a Alpha Xi Chapter ("Fraternity"), University of Delaware ("UD"), Alpha Epsilon Phi Sorority, individually and t/a Phi Chi Chapter (the "Sorority" or "AE Phi"), Executive Banquet & Conference Center ("Executive Banquet Center"), Capozzoli Catering of Delaware, Inc. ("Capozzoli"), Linwood A. McLean ("Driver" or "McLean"), Plumbers & Pipe Fitters Local No. 74 ("Local 74"), and Plumbers & Pipe Fitters Social Club ("Social Club").

Plaintiffs filed several Amended Complaints, including a Third Amended Complaint filed on November 29, 2016 (A39, TID 59882368; B46-79). The Sorority filed Answers to each of Plaintiffs' Complaints, including the Third Amended Complaint; the Sorority denied that it was negligent in any respect and raised affirmative defenses, including numerous defenses revolving around and corollary to a lack of duty (A42, TID 60073128; B80-90). The Fraternity was voluntarily dismissed by Plaintiffs, with consent of all parties, on or about December 16, 2016 (A41, TID 59966057).

Subsequently, the remaining Defendants each filed for summary judgment.[2] The issues were extensively briefed and then argued before Honorable Ferris W. Wharton. Copies of the pertinent briefs associated with the Sorority's motions for summary judgment are included in its Appendix (B91-409). A copy of the November 29, 2017 transcript of oral argument on UD's and the Sorority's motions for summary judgment appears at A101-233.

On February 28, 2018, Judge Wharton issued a Memorandum Opinion and Order in which he granted summary judgment in favor of all remaining Defendants, including the Sorority, based upon lack of a breach of duty and lack of

[2] The Court granted the Driver's motion for summary judgment on March 13, 2017 (A49, TID 60327512).

proximate causation (B401-448).[3] Plaintiffs appealed the summary judgment ruling in favor of the Sorority. This is the Sorority's answering brief.

[3] The Court denied as moot the Sorority's summary judgment motion based upon Decedent's reckless conduct and comparative negligence (B411).

SUMMARY OF ARGUMENT

1. Plaintiffs' appeal should be denied because no material dispute of fact exists relative to the Sorority's lack of a breach of duty. In granting summary judgment, the Superior Court ("the Court") correctly noted that Delaware law has a long-standing history of not permitting Dram Shop or Social Host claims. The Court then properly determined that the Sorority did not breach any claimed duty based upon §323 of the Restatement (Second) of Torts but, rather, the Sorority met any duty it owed when it safely provided transportation to, and then from, the event, which the Decedent, Mr. Connolly, failed to use. Without explanation or notice, Decedent left the Event early and his death on a public highway occurred before the busses had left. The Court also properly determined that the Sorority could not be held liable for a premises liability claim because Mr. Connolly's death did not occur on the property where the Event was held. For all these reasons, the Court correctly held that there was no duty and/or no breach of any duty on the part of the Sorority.

2. Plaintiffs' appeal should be denied because proximate causation cannot be established. The Court properly held, as a matter of law, that Decedent proximately caused his own death. He voluntarily consumed alcohol and became heavily intoxicated, left the Event without warning or notice, and was killed because he stepped in front of a car. The Sorority cannot be deemed to be the

legal, proximate cause for his death.

STATEMENT OF FACTS

The salient facts regarding the fateful events leading up to Ethan Connolly's accident are not in dispute. In the fall of 2013, Ethan Connolly was a nineteen year old sophomore at the University of Delaware. He was a member of Theta Chi Fraternity.

On the evening of October 17, 2013, the University of Delaware Chapter of the Sorority, Alpha Epsilon Phi, Phi Chi, hosted a "Crush" Event at the Executive Banquet & Conference Center in Newark, Delaware, where they had hosted several other social functions in the past. A "Crush" Event was a social function held by AE Phi where members of the Sorority were permitted to invite either one or two guests, depending upon the member/sister's class year, as a date to the invitation only event (A286, at 20:7-15) . Tickets to the Event were issued in advance to the Sorority members and names of attendees were required to be provided to the Sorority's Vice President of Social at the time, Sarah J. Eller (A365-369, at 99:22-103:6). Ms. Eller was the Vice President of Social for AE Phi during the school years of 2012-2013 and 2013-2014, and was primarily responsible for organizing social events for the Sorority such as the Event on October 17, 2013 (A299, at 33:4-8). Mr. Connolly was allegedly the guest of Stephanie Auerbach, a member of AE Phi, at the Event (A395, at 129:14-22). Rachel Loya, then-President of the Sorority, testified that she spoke with Stephanie

the day after the accident and Stephanie advised that Ethan Connolly rode on the bus with her to the Event, but that at some point in the evening she lost track of him and they did not go home together (B18, at 62:4-14).

Prior to the October 17, 2013 Event, the Sorority had held numerous other functions at the Executive Banquet Center, an off-campus venue catered by Capozzoli Catering of Delaware (A282-283, 301, at 16:20-17:3; 35:16-19). Because the venue was off-campus, the Sorority would hand in contracts from the venue to the Greek Life office at the University of Delaware which included documents such as an alcohol license checklist and third-party vendor checklist (A305-306, at 39:16-40:14.3).

The Event Booking Agreement between the Executive Banquet Center/ Capozzoli Catering and the Sorority for the subject event provided:

> Security. If, *in the sole judgment of Executive Banquet and Conference Center*, security is required to maintain order due to the size and nature of your event, Executive Banquet and Conference Center may require you to provide, at your expense, uniformed or non-uniformed security personnel. Any and all provisions for security must be arranged through Executive Banquet and Conference Center's manager. Executive Banquet and Conference Center shall have final approval on any and all security personnel to be utilized during your function (A519-520) (emphasis added).

The Agreement further provided:

> Alcohol Beverages. Only Executive Banquet and Conference Center employees – servers and bartenders,

> will dispense all alcoholic beverages. Executive Banquet and Conference Center's alcoholic beverage license requires Executive Banquet and Conference Center to (i) request proper identification (photo ID) of any person of questionable age and refuse alcoholic beverage service if the person is either under age or proper identification is not produced and (ii) refuse alcoholic beverage service to any who in the judgment of Executive Banquet and Conference Center's employee appears intoxicated (A520).

Ms. Eller testified that one of the reasons the Sorority utilized the Executive Banquet Center was because it offered security measures such as checking identification to ensure individuals were of drinking age and performing checks on individuals entering the event to ensure they were not bringing in drugs or alcohol (A330-332, at 64:23-66:8). Additionally, the security personnel at the Executive Banquet Center would provide wristbands to those individuals twenty-one (21) years or older to designate who was of drinking age as a cash bar was available (A421-422, at 155:20-156:4). Ms. Eller testified that it was the Sorority's understanding and expectation that the staff at the Executive Banquet Center were checking identification and refusing to serve underage individuals (A342, at 76:11-19). The Sorority also designated "sober sisters" for social events, including the Event on October 17, 2013 (A384, at 118:17-6). On the evening of October 17, 2013, Ms. Eller expected there would have been at least two or three designated (A385, at 119:18-120:1).

The Sorority also provided transportation to and from off-campus events,

including the "Crush" event on October 17, 2013 (A359-360, at 93:16-94:17). The Sorority's Alcohol Policy required the Sorority to (a) "hire a licensed bartender who undertakes responsibility for determining who will be served", and (b) "make available transportation to and from such events" (A521). It did both of these things on the evening in question.

The Sorority would charter buses from one of several companies they used to provide a safe means for members and guests to travel to and from their functions (A359-360, at 93:16-94:17). Furthermore, Ms. Eller testified that it was the Sorority's policy not to permit any alcoholic beverages or other illegal substances on board the mode of transportation to functions (A361, at 95:9-15). In order to implement this policy, the Sorority divided members of their Executive Board and additional "sober sisters" amongst each bus to take tickets before boarding, check bags and purses at the time of boarding, assess the individuals getting on to make sure they were not intoxicated, and monitor the buses (A361-362, 373, at 95:16-96:17; 107:8-24). Ms. Eller testified that the Phi Chi Chapter of AE Phi made it a requirement that those attending events such as the "Crush" Event ride the bus to and from the function (A378, at 112:9-21).

The Executive Banquet Center was owned by Local 74.[4] Capozzoli was a

[4] *See* Court Memorandum Opinion discussing facts and citing to opening brief of Capozzoli (B414-415, 275-279). These facts are consistent with the Event Booking Agreement entered into between the Sorority and Capazzoli as well as the

tenant of Local 74 and it operated a catering business out of the Center. Local 74 maintained the sole liquor license for the Center. The Social Club, an affiliate of Local 74, was solely responsible for serving alcohol from the bar, which was a cash bar, at the Banquet Center. Three licensed Social Club employees staffed the bar. Two Additionally, two other Social Club employees inside the Banquet Center monitored the venue, the bathrooms, and the foyer leading into the venue.

It is undisputed that Mr. Connolly voluntarily left the Crush Event prior to its conclusion.[5] It is undisputed that there is no Record evidence that he told anyone that he was leaving the Event, assuming that he was there. Ms. Eller testified that sometime after the accident, she was told that Mr. Connolly left the Event potentially to go out looking for cigarettes (A394, 398, at 128:4-10; 132:1-3; B19, at 68:13-16), though there was no nearby location to buy cigarettes and no evidence was ever produced showing that he had done so (A459, at 193:14-17). Decedent's date sent text messages to him to find out where he was at departure time but he never answered. Whatever the reason for his leaving the Event, Mr. Connolly did not take the provided bus transportation back to campus.

There has been no testimony and there is no evidence that Mr. Connolly was served alcohol at the Sorority's Event. There is also no Record Evidence to

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testimony of Sarah Eller (*see generally* A424-431,435), and Hillary Myers (A538-539, at 19:01-20:17).

[5] Even Plaintiffs' counsel admitted that decedent had left before the busses left. (A.166).

establish when and where he drank. Daniel Bernstein, who was with Mr. Connolly at the time of the accident, told a responding police officer that they "had been drinking whiskey and gin" and further that "to get into the fraternity, the group had to hold their breath, chug alcohol, and possibly step off the sidewalk into the street" (A243).[6] Furthermore, Bonnie Wunsch, Executive Director for Alpha Epsilon Phi Sorority, testified that following the event she and Adam Cantley from the University of Delaware discussed the incident involving Mr. Connolly and Mr. Cantley advised that the Sorority had "followed policy and that this was an unfortunate incident" (B32, at 20:3-21).

For whatever the reason, in the early morning hours of October 18, 2013, at approximately 12:30 a.m., a highly intoxicated Mr. Connolly made the ill-fated decision to attempt to step or dart or otherwise try to cross Route 896 on foot. He did so outside of a fully marked crosswalk with traffic lights that was identified in the police report as being only twenty feet away, and he stepped directly in the path of Mr. McLean's vehicle (A254-258). Mr. Connolly was not wearing any reflective clothing or material and was not carrying any flashlight or other lighting device (A234-260). Having no warning or ability to avoid Mr. Connolly, Mr. McLean struck Mr. Connolly, leading to his death.

[6] Further, Plaintiffs' Third Amended Complaint included claims of hazing. The suggestion here is that it may have occurred on Route 896, but, if that occurred, it would have away from the Event and not involved the Sorority. Moreover, the Fraternity was voluntarily dismissed from the case.

As demonstrated in the toxicology report, Mr. Connolly's blood alcohol level from his urine was 0.304 g/dL and his urine tested positive for Delta-9-Carboxy-Tetrahydrocannabinol ("THC") (A252, A262; B1). The Delaware State police investigative report noted: "Primary Contributing Circumstance: Pedestrian" (A241), and further stated that "[t]he primary cause of this fatal collision is the failure of Victim Ethan Connolly and Injured David Bernstein to properly yield to on-coming traffic when crossing the highway" (A258).

During the motion for summary judgment oral argument, defense counsel for the Sorority noted that Decedent's actions were in violation of numerous Delaware statutes, including underage drinking, walking on a highway under the influence, walking on a roadway without a flashlight and without any reflective devices, failing to use the designated crosswalk, failing to yield the right of way to traffic (A134; see also B421-423). The Delaware state police Fatal Motor Vehicle Collision investigative report(s) also referenced several of the applicable statutes violated by Mr. Connolly (A234-260), and at least one of the individuals interviewed by the police was criminally charged with underage drinking, being drunk on the highway, and other charges (A257).

The Fatal Motor Vehicle Collision reports indicate that the motorist travelling behind Mr. McLean, Kristen Ames, corroborated the account of the accident indicating that Mr. Connolly, along with his friend, Daniel Bernstein,

walked out into Route 896, outside of a crosswalk, and into the path of Mr. McLean. Ms. Ames recounted that the accident was in no way Mr. McLean's fault (A. 256).

The Complaints filed by Plaintiffs contain references to various statistics in regard to alcohol and hazing-related injuries; these appear in paragraphs 25-40 of the Third Amended Complaint. These are part of the Plaintiffs' efforts to assert Dram Shop and Social Host claims. The new claims in the Third Amended Complaint against the Sorority appear in paragraph 56(l)-(m), with similar claims being asserted against UD, Local 74, Plumbers, and Executive Center. These new claims are at the center of the Plaintiffs' appeal. They seek to impose liability on the Sorority based upon an alleged failure to assure decedent was returned to campus on bus and claimed violations of duties under *DiOssi* and *Furek* (B430-436).

In the Court's Memorandum Opinion and Order dated February 28, 2018, Judge Wharton held that no Dram Shop or Social Host duties existed under Delaware law. Judge Wharton noted that Delaware courts have a long history of upholding Dram Shop and Social Host immunity and that the Delaware Supreme has concluded that any change in this area of the law is best addressed by the legislature, and not the courts (B438-443). Further, the Court rejected Plaintiffs' argument that the outcome should be any different because Mr. Connolly was a

minor for purposes of the Delaware underage drinking statute (B440-441) (noting that "'[h]uman beings, drunk or sober, are responsible for their own torts;'" and that "[i]n the nearly four decades since *Wright* was decided, neither the Supreme Court, nor the General Assembly has altered these principles," even when the intoxicated person was a minor)).

Judge Wharton also rejected Plaintiffs' arguments that a premises liability cause of action sounded against the Sorority, because the accident did not occur at the Event but rather occurred on a public roadway. As the Court explained:

> The cases by the Connollys to support their premises liability claims—*DiOssi, Furek and Jardel, Inc. v. Hughes*—do not support their position. Each of those cases addressed the defendants' liability in the context of injuries occurring on the defendants' property (B433).

Judge Wharton further determined that any claimed duty under §323 of the Restatement (Second) of Torts on the part of the Sorority to provide transportation to and from the event was met by the Sorority. In so finding, the Court stated:

> 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 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. The Court simply does not accept, nor find any warrant for, the Connolly's 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 (B444-445).

Finally, the Court held that Plaintiffs' claims against the Sorority were also barred, as a matter of law, due to Plaintiffs' inability to be able to establish the necessary element of proximate causation (B445-448).

ARGUMENT

I. The Sorority Did Not Breach Any Duty To Plaintiffs' Decedent.

A. Question Presented

Whether the Superior Court properly granted summary judgment to the Sorority because the Sorority did not breach any duty to decedent? (A101-223; B80-90; B91-409; B410-448)

B. Scope of Review

The Delaware Supreme Court reviews a Superior Court decision granting summary judgment *de novo*. *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 708-09 (Del. 2008); *McCall v. Villa Plaza*, 636 A.2d 912, 913 (Del. 1993). Under this standard, viewing the facts in the light most favorable to the non-moving party, the Supreme Court should affirm if the moving party "has demonstrated that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law." *McCall*, *supra*.

C. Merits of the Argument

To state a claim for negligence, Plaintiffs must establish that there is a duty, a breach of that duty, and injury resulting from the breach. *Piper v. Parsell*, 930 A.2d 890 (Del. Super. 2007). Absent a duty under the existing law, there is no basis for a Plaintiffs' claims to proceed to the jury. *Id*.

"[W]hether a duty exists [in the first place] is entirely a question of law, to

be determined by reference to the body of statues, rules, principles and precedents which make up the law; and it must be determined by the Court." *Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002); *see also O'Connor v. Diamond State Tel. Co*., 503 A.2d 661, 663 (Del. Super. 1985) ("The question of duty is traditionally an issue for the court.")

In the instant matter, the Sorority properly filed for and was granted summary judgment by the Superior Court . As noted by the Court, Delaware law does not allow Dram Shop or Social Host claims, or a run-around of such claims (B432-448) (citing to numerous cases, including *Wright v. Moffitt*, 437 A.2d 554 (Del. 1981), *McCall v. Village Plaza*, 636 A.2d 912 (Del. 1993), *Oakes v. Megaw*, 565 A.2d 914 (Del. 1989), and *Shea v. Matassa*, 918 A.2d 1090 (Del. 2007),[7] where Dram Shop and Social Host immunity was upheld by the Delaware Supreme Court in a multitude of different factual scenarios)). Indeed, the Court aptly noted: "In the nearly four decades since *Wright* was decided, neither the Supreme Court, nor the General Assembly has altered these basic principles" (B440). In the case at hand, the same legal principles apply.

As such, neither Dram Shop nor Social Host liability theories can be relied upon by Plaintiffs as a basis for liability against the Sorority. Because a claim cannot be predicated upon such theories, the Court below correctly noted that

[7] In fact, *Shea v. Matassa* was a combined Dram Shop/Social Host case, where no recovery was permitted.

Plaintiffs' only remaining potential theories of liability against the Sorority were a premises liability cause of action or a specific gratuitous undertaking pursuant to §323 of the Restatement (Second) of Torts (B432-448). Such claims, however, also do not survive summary judgment, as the Court properly noted in its well-reasoned decision.

First, it is important to note that the Sorority had no contractual obligation to provide security or serve alcohol (A517-520). Additionally, any civil liability stemming from such alcohol-related claims or events runs counter to Dram Shop and Social Host immunity as applied by the Delaware courts. As the Court stated: "All of the alleged breaches of those alleged duties, except two involving transporting Ethan to and from the crush event, involve providing him with alcohol. Dram Shop and Social Host immunity bars those alcohol related claims" (B441), and in that regard, the Sorority met any duty it may have under to provide transportation to and from the event (B439-445).

The Sorority complied with its Sorority Alcohol Policy (A521) by hiring a competent bus company to provide such transportation to and from the Event. In fact, decedent was transported to the event, and would have been transported from the event had he not left the event before the busses left. Nowhere does the Sorority Alcohol Policy require the Sorority to prevent Decedent from leaving the event, particularly when he left without warning or notice.

Here, the required transportation was offered and provided. The Decedent, however, left the Event before the busses left. This is an undisputed fact of the case. It is also an undisputed fact that everyone who abided by the Event rules by taking the bus transportation provided to them at the end of the Event was able to be safely transported from the Event.

The cases cited by Plaintiffs throughout the motion for summary judgment proceedings, and now on appeal, do not support the imposition of a broad-based, general duty to protect the Decedent on part the Sorority as Plaintiffs would claim. For example, in *DiOssi v. Maroney,* 548 A.2d 1361 (Del. 1988), a party was given by parents at their home for their 18 year old daughter. The plaintiff in *DiOssi* was a part-time employee of a company which contracted with the parents to provide valet parking service for guests at the party. At about 4:30 a.m., a 19 year old, whose BAC later registered 0.15, lost control of his car and ran into the plaintiff, who was standing near the home entrance. The Supreme Court of Delaware in *DiOssi* focused upon the fact that the injuries which occurred happened on private property where the plaintiff was a business invitee. Thus, the *DiOssi* Court focused on "an examination of the duty of a property owner…." *Id*. at 1364. Significantly, the *DiOssi* Court observed that:

> we do not deem it necessary to deal with the broad question of social host liability for the furnishing of alcoholic beverages in this case. The facts of this case permit a more narrow predicate for liability, one which

> arises from the common law duty of a property owner to a business invitee. In our view, the focus of liability in this case is on the exposure of a business invitee to a dangerous activity which the property owner permitted to exist on his land. The fact that the activity arose out of the furnishing of intoxicating liquor does not preclude the fixing of liability, notwithstanding the limitation of such claims against commercial dispensers.

Id.

Analyzing the common law duty of a premises owner to business invitees, the Supreme Court in *DiOssi* specifically held that "the Maroneys had a duty to provide a reasonably safe workplace for the plaintiff who was on the premises as a business visitor." *Id*. at 1368. The *DiOssi* Court was also careful "… to emphasize what we do not decide". *Id*. at 1369. As the Supreme Court in *DiOssi* explained, its ruling was <u>not</u> predicated upon a finding of Social Host liability.

> 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 liability of social hosts arising out of the mere dispensing of alcoholic beverages in the absence of a property nexus or the involvement of minors. We leave such considerations to another day.

Id.

DiOssi is therefore both factually and legally distinguishable from the instant matter. The fatal injury to Decedent, Mr. Connolly, did <u>not</u> occur on the premises where the Event was held. Rather, it occurred in the middle of a public

highway when Decedent walked into the path of an oncoming vehicle. Thus, *DiOssi* does not impose a duty upon the Sorority under the circumstances of this case.

Nor does the *Furek* case impose a duty upon the Sorority under the circumstances of this case. In *Furek v. Univ. of Delaware*, 594 A.2d 506 (Del. 1988), the plaintiff decided to join a local fraternity chapter whose fraternity house was situated on land which the University of Delaware owned and leased to the national fraternity, Alumni Corporation. As part of the pledge process, the pledges, including plaintiff, underwent hazing and an initiation process culminating in "Hell Night". During this hazing process, one of the fraternity brothers poured a lye-based liquid oven cleaner over plaintiff, causing him to suffer chemical burns. Also, hazing had occurred at the subject fraternity and others for at least five years before the incident, despite University of Delaware and the national fraternity's prohibitions.

The *Furek* Court defined the core issue in that case as follows: "The principal dispute in this appeal concerns what, if any, duty the University owed to Furek to protect him from the hazing activities of Sig Ep and its members…." *Furek*, 594 A.2d at 514. The *Furek* Court then rejected the application of §324A(b) of the Restatement (Second) of Torts as support for an alleged duty owed by the University to plaintiff, noting that there was no evidence that plaintiff

relied on the University for his safety or believed that the University had undertaken a duty of protection owed by another.

The *Furek* Court, however, viewed §323 of the Restatement as being applicable to the University in that case relative to the issues presented involving on-campus fraternities and pledges. Because the University had prior involvement in and knowledge of the existence of hazing on its campus, the *Furek* Court held that the plaintiff had a basis for recovery based upon his "status as an invitee on University property, where a property owner had a duty to protect an invitee from known hazards". *Id*. at 520 (*citing DiOssi, supra*). Thus, the underpinning of the ruling in *Furek*, as in *DiOssi*, was the fact that an injury had occurred on the defendant's property.

On the other hand, in *McCall v. Villa Plaza*, 636 A.2d 912 (Del. 1993), the Delaware Supreme Court held that summary judgment was properly granted to a tavern owner where injury occurred off-premises. In *McCall*, the defendant had ejected the plaintiff-patron from its bar after he became intoxicated while at the bar. The defendant then left plaintiff outside of the bar, in violation of its own policies. Those policies required the defendant to call a cab or otherwise provide transportation to plaintiff and also to notify the manager. After being forcibly removed from the premises and left outside in violation of the defendant's policies, the plaintiff-patron in *McCall* staggered to his car, got in it, started it, drove away,

and then caused an accident and was injured.

The Delaware Supreme Court in *McCall* held that any attempt by plaintiff to cite to §324 of the Restatement (Second) of Torts amounted to a circumvention of Delaware's long-standing Dram Shop immunity. The *McCall* Court concluded that if such immunity was ever to be abrogated, it was the responsibility of the General Assembly, not the Court, to impose such a duty. *McCall*, 636 A.2d at 913-915.

In reaching its conclusion, *McCall* cited to the oft-repeated holding of the Delaware Supreme Court in *Wright v. Moffit*, 437 A.2d 554, 557 (Del. 1981). In *Wright*, the Delaware Supreme Court recognized the legislature's policy-making role in this regard. The *Wright* Court stated that:

> [T]he issue has many practical implications: for example: should any such liability extend to a hotel dining room or restaurant owner (or to a social host) as well as to a "tavern" owner? should it extend to assaults or other torts by an inebriated patron? to whom should such a cause of action accrue? should there be a special role for minors? And, inevitably, if a cause of action were recognized under any of these circumstances, a commercial dispenses of alcoholic beverages (and, probably a social host) would be a party to every suit in which an intoxicated person is alleged to have committed a tortious act.

Wright, 437 A.2d at 556.

Furthermore, the Delaware Supreme Court has repeatedly held that with

respect to any claimed existence of a duty of defendant to act under §323,[8] the imposition of any such duty is limited to injuries "occurring on its property". *Rogers v. Christina Sch. Dist.,* 73 A.3d 1, 9 (Del. 2013) (*citing Furek*, 594 A.2d at 522). *Rogers* involved a student who committed suicide off-campus after notifying a counselor on campus that he had been suicidal. The *Rogers* Court noted that *Furek* and §323 of the Restatement (Second) of Torts only applied as a basis for liability, because in *Furek* the injury occurred on the property of the entity owing the duty. *Id*.

The *Rogers* Court cited *Jain v. State*, 617 N.W.2d 293 (Iowa 2000), which, it noted, had analyzed §323(a) and (b) of the Restatement (Second) of Torts to see whether defendant's action had increased the risk of self-harm to the plaintiff. The *Jain* Court held that under §323(a), no action taken affirmatively by the defendant's employees increased any risk of harm to plaintiff or prevented the plaintiff from taking advantage of what was offered. Further, under §323(b), the *Jain* Court found that the record lacked any proof that the plaintiff had relied to his detriment upon services that were gratuitously offered to him. The Delaware Supreme Court in *Rogers* ultimately held that "[c]onsisent with our decision in *Furek* and the Iowa Supreme Court decision in *Jain*, the School did not assume a general duty of care" to the decedent. *Rogers*, 73 A.3d at 10.

[8] As the Plaintiffs are claiming against the Sorority.

In the instant case, the Decedent's fatal injury did not occur on the premises where the Event was held but rather occurred on a public highway. Moreover, no actions taken by the Sorority increased any risk of self-harm to Mr. Connolly or prevented him from taking advantage of what was offered. The Sorority's providing transportation to and from the event and having Sorority sisters who were sober at the Event did not increase the risk of harm to Decedent. Likewise, no one prevented him from going back to campus on the bus. Thus, §323 provides no basis for any duty on the Sorority's part to Decedent.

Plaintiffs have sought to argue that Mr. Connolly, who was nineteen years old, is a minor under state law prohibiting the serving alcohol to minors, but that the statute has never served as the basis for a civil cause of action. *See Zonko v. Brosnahan*, 2007 Del. Super. LEXIS 305 (Del. Super. Ct. Oct. 23, 2007) (holding that the statutory prohibitions regarding providing alcohol to minors in a Social Host setting do not create a civil cause of action). The Superior Court in *Zonko* cited to Delaware Supreme Court precedent in *Oakes v. Megaw*, 565 A.2d 914, 916-17 (Del. 1989), where the Supreme Court held that a cause of action was not recognized merely because the person consuming alcohol was a minor. *Zonko*, 2007 Del. Super. LEXIS 305,*8-10 (citing, *Oakes*, *supra*)).

As stated in the Sorority's opening brief in support of its motion for summary judgment, and as stated by the Sorority's counsel during oral argument,

the Decedent had reached the age of legal majority. Thus, Decedent was an adult under Delaware law (A-136) (citing 1 *Del. C*. §302(1)). *Furek* has also recognized this basic principle, citing to the United States Supreme Court decision in *Haley v. James*, 408 U.S. 169, 197, 92 S.Ct. 2338 (1972) (noting that individuals over eighteen are adults and that they have responsibility for their own safety). *See Furek*, 594 A.2d at 516, n.6.

In short, the Plaintiffs have not cited to any controlling cases to support their position that the Sorority breached any duties which it may have owed to decedent. The matter was briefed and argued extensively before the Superior Court, which properly granted summary judgment to the Sorority based upon a lack of duty.

In its February 28, 2018 Memorandum Opinion and Order, the Court correctly noted that most of Plaintiffs claims were barred by Delaware's Dram Shop and Social Host immunity and, further, that there was no basis for a premises liability claim, or for a claim under either §323 or §324, under either *DiOssi* and *Furek*, as alleged in Plaintiffs' Third Amended Complaint (B410-448).

Nor are there any material disputes of fact. In granting the Sorority's motion for summary judgment, the Court pointed to the many factual and legal shortcomings of Plaintiffs' claims.

> 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 a

> 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 killed is completely absent from the record. In short, the most the Connolly arguably can be said to have established as far as a factual record is that Ethan went to a crush party on a bus provided by the Sorority, went inside the Banquet Center, consumed an unknown amount of alcohol procured by unknown means, and left sometime before the party ended…
>
> 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 [Third Amended Complaint] either without evidentiary support or without relevance….Ultimately…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.

(B431-432).

In this case, Plaintiffs failed to present sufficient evidence to support their claims against the Sorority. As such, the Court's summary judgment ruling in favor of the Sorority based upon lack of a breach of duty should be affirmed.

II. Decedent's Conduct Was The Proximate Cause Of His Death.

A. Question Presented

Whether the Superior Court properly granted summary judgment to the Sorority based upon its determination that the Decedent's conduct was the proximate cause of his death? (A101-223; B80-90; B91-409; B410-448)

B. Scope of Review

The Delaware Supreme Court reviews a Superior Court decision granting summary judgment *de novo*. *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 708-09 (Del. 2008); *McCall v. Villa Plaza*, 636 A.2d 912, 913 (Del. 1993). Further, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law. *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967); *McCall*, *supra*; see also *MacDougal v. Mahafty & Assoc.*, 2013 Del Super. LEXIS 83, *8-10 (Del. Super. Ct. Jan. 22, 2013).

C. Merits of the Argument

Delaware recognizes the traditional "but for" definition of proximate causation. *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991). "Our time-honored definition of proximate cause … *is that direct cause without which an accident would not have occurred*." *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965) (emphasis added). 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." *Culver*, 588 A.2d at 1097.

As the Court noted in its Memorandum Opinion and Order, there are instances when the Court may, as a matter of law, decide a case on the basis of lack of proximate causation. (B445-448). This is such a case because under Delaware law, the undisputed material facts of this case are not reasonably capable of different conclusions, making summary judgment appropriate on the issue of proximate causation.

In support of its determination that Plaintiffs' claims as to all defendants were barred, as a matter of law, because Decedent's own conduct was the proximate cause of his death, the Court stated:

> 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. Here, there can be but one conclusion of proximate cause. Informed by the understanding that the common law recognizes no relationship of probable cause between the seller of alcohol and the 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 attempting to cross Route 896 approximately 90 feet[9] 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 (B444-447).

As can be seen, there is no factual or legal basis for Plaintiffs to shift proximate causation onto the Sorority under these circumstances. The actions which led directly to Decedent's death were the actions he took, including stepping in front of a moving vehicle. Hence, for this reason as well, the Court's order granting the Sorority's motion for summary judgment should be affirmed.

[9] At one point, the police report notes the crosswalk was only 20 feet away from where the point of impact occurred (A258). It is unclear if the referenced 90 foot distance was from the point of rest (A247). In any event, the same result applies.

CONCLUSION

WHEREFORE, Defendant-Below, Appellee, Alpha Epsilon Phi Sorority, individually and t/a Phi Chi Chapter, respectfully requests that this Honorable Court deny Appellants' appeal, and affirm the Superior Court's decision below granting the motion for summary judgment of, and dismissing all claims against Alpha Epsilon Phi Sorority, individually and t/a Phi Chi Chapter.

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