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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' REPLY BRIEF

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I. The Superior Court erred by granting the Sorority summary judgment. The Superior Court held that the Sorority owed a legal duty to fulfill its assumed obligation of safely transporting Crush Party attendees to and from the Party, and the Connollys produced evidence for a jury to conclude that the Sorority breached that duty.

A. As the Superior Court held, the Sorority assumed the duty to safely transport Crush Party attendees to and from the Party back to campus.

The Superior Court held that the Sorority did assume the duty to safely transport party attendees to and from the party back to campus. Moreover, the Superior Court specifically held that "[i]n fact, the Sorority required attendees to ride the buses it provided." Memorandum Opinion and Order of February 28, 2018, p. 34, attached to Appellants' Opening Brief (hereafter referred to as "Mem. Op. at p.__"). This duty includes the duty to ensure that Ethan got on the bus and that he not leave the party venue at the party's conclusion. As the Superior Court recognized, Delaware Courts have followed *Restatement (Second) of Torts Section 323*, finding that one owes a duty who "assumes direct responsibility for the safety of another through the rendering of services in the area of protection." Mem. Op. at p. 35, *citing*, *Furek v. University of Delaware*, 594 A.2d 506, 520 (Del. 1991). Accordingly, the Superior Court held that the Sorority's "area of protection" included the assumed duty for Ethan's safety in transporting him to and from the event. The reason for the Sorority's transportation policy is obvious; the Sorority

did not want impaired attendees, including Ethan, driving or walking to or from the party, endangering themselves or others. *Id*.

For purposes of this appeal, there is no question that the Sorority assumed the duty of ensuring that attendees travel by buses provided in a safe manner for their own welfare, as recognized by *Section 323*. The only issue presented on appeal regarding the Sorority's duty is whether the factual issue of the Sorority's breach of that duty should be decided by a jury. The Superior Court held that *Section 323* applies in this case, and under that section, the Sorority owed a duty to Ethan because it assumed one. Indeed, the Sorority does not challenge in its Answering Brief the Superior Court's holding that it owed an assumed duty to safely transport Ethan to and from the party under *Section 323*. The Sorority also did not file a cross appeal of the Superior Court's decision on this issue. *See Universal Underwriters Ins. Co. v. Travelers Ins. Co*., 669 A.2d 45 (Del. 1995).

The Superior Court was correct in finding that the Sorority owed a duty to Ethan. As the Sorority notes, Delaware Courts' *Section 323* application follows the Iowa Supreme Court's interpretation of *Section 323*. Following *Jain v. State*, 617 N.W. 2d 293, 299 (Iowa 2000), the Iowa Supreme Court again applied section 323 in *Estate of Long v. Broadlawns Med. Ctr*., 656 N.W. 2d 710 (Iowa 2002). In *Estate of Long*, a husband left a treatment center and shot and killed his wife at home. The Iowa Supreme Court held that the treatment facility assumed the duty

under *Section 323* to warn the wife when the husband was discharged from the treatment facility. Thus, it is immaterial that the wife was harmed at home rather than at the treatment facility. The duty assumed under *Section 323* to another is not dependent on where the foreseeable and preventable harm is suffered.

B. The Sorority breached its duties to Ethan by not returning him safely to campus either during the party by taxi accompanied by a sober sister or, by ensuring that he board the buses and not leave the party at its conclusion.

There is no question that the Sorority owed a duty to Ethan to return him safely to campus, regardless of where he was eventually killed. The point being that the Sorority owed this duty, breached it by not returning Ethan safely to campus, thereby proximately causing his death. *See Burke v. Frabizzio*, 1982 Del. Super. Lexis 811 (Del. Super. Nov. 3, 1982) ("It has long been a recognized principal of tort law that a duty may be based on a gratuitous undertaking*"); Kelly v. Shimel*, 1989 Del. Super. Lexis 252 (Del. Super. June 26, 1989) (duty under section 323 not dependent on where negligence occurred); *Jardel v. Hughes*, 523 A.2d 518 (Del. 1985) (rape occurred off premises); *Haynie v. Sheldon, Inc.*, 1985 Del. Super. Lexis 1090 (Del. Super. Jan., 21, 1985); *Rogers v. Del. State Univ.*, 2006 Del. Lexis 409 (Del. Supr. 2006) (defendant owed duty by undertaking security even though harm occurred on private property off campus).

The Sorority's duty is codified in its alcohol policy, confirmed by the Sorority's vice president of social (at the time of the party), Sarah Eller. (A360, A364, A379, A521, A555, A641). Ms. Eller had the responsibility of entering into contracts for Sorority events, and arranging and organizing the parties. See Ans. Brief, p. 6. Ms. Eller explained that it was the Sorority's policy to get attendees safely to and from the party, and that the attendees were required to use the provided buses so that the Sorority would maintain control of the attendees travel to and from the event. (A360, A378, A397-399; A530). It was also the duty of the Sorority to identify impaired attendees during the party, and if prior to the party's conclusion, return the impaired attendee by taxi accompanied by a sober sister back to campus. (A418, A530). However, on the evening of Ethan's death, the Sorority did nothing to enforce its policies. It did not inform attendees that they must only go to and from the party on the buses, must board the buses at the conclusion of the party, and not leave the venue. The Sorority trumpets that all abided by the event rules, unsupported by any citation to the record below. However, that is not accurate, as Daniel Bernstein also left the party without boarding the bus. Moreover, there is no evidence that anyone from the Sorority informed attendees of the Sorority's transportation policies. How would attendees know the Sorority's policy? Additionally, the Sorority did not monitor attendees to make sure they did not leave the venue and board the buses at the conclusion of the

party. (A419). It did not take attendance to board the buses to ensure that all attendees were accounted for. (A420; A543-544). It did nothing to monitor attendees to make sure that all were returned safely to campus. Whether Ethan left the venue at the conclusion of the party, or during or prior to, is a factual issue for resolution by the finder of fact. In determining whether the Sorority breached its duties owed, it is also immaterial. As Ms. Eller confirmed, it is the Sorority's duty to make sure that attendees are returned safely to campus. If before the conclusion of the party and a party-goer is impaired, it is the Sorority's obligation to arrange transportation by taxi for that person back to campus, accompanied by a sober sister. For purposes of summary judgment, the Sorority failed to comply with its duties, and it is of little importance when Ethan left the party.

The Sorority's claim that its failure to safely return Ethan to campus either by taxi or by bus did not increase his risk of harm, is belied by the facts presented and common sense. The Sorority's policy required all attendees to only use the provided buses to and from the party. The Sorority assumed the duty of safety for attendees getting to and from the party. The purpose of the policy was for the safety of the attendees who may have imbibed alcohol. The purpose of sober sisters and sending impaired persons back to campus before the party's conclusion was for the protection of the attendees. Failure to monitor impairment of attendees and their need to be transported back to campus and not leave the venue on foot,

directly led to Ethan's demise, and certainly increased the risk of harm to him. Indeed, the type of outcome that befell Ethan was the precise outcome that the Sorority's policies were designed to avoid. If the Sorority had not breached its duties, Ethan would have been returned safely back to campus.

Because the Sorority failed to follow its policies in returning Ethan during the party by taxi with a sober sister back to campus, or making sure that the attendees board the buses at the conclusion of the party and not leave either by car or on foot, the Sorority breached its duties owed. Ms. Eller acknowledged that the Sorority did not follow the Sorority's policies. (A-392-393; A-397-399). As Ms. Eller explained, the Sorority's transportation policy's purpose was for the safety of the attendees. It was foreseeable that impaired attendees may be a danger to themselves or others. Certainly, the Sorority in the past had experience with problems at events where alcohol was served. Although the Sorority contends its duties were only to make transportation available (Ans. Brief, p. 9), which is contrary to and not supported by Ms. Eller's testimony, this presents an issue of fact for the jury's resolution. A trier of fact may reasonably infer that requiring attendees to use the provided transportation to, and from the party, was premised on the foreseeability of harm to the attendees, and the issue of whether the duty was breached is reserved for the trier of fact. *See Richards v. Salvation Army*, 1996 Del. Super. Lexis 292 (Del. Super. June 24, 1996); *Perez-Mechlor v.*

Balakhani, 2005 WL 2338665 (Del. Super. 2005) ("question of foreseeability is usually a finding of fact left to the jury"); *Griffith v. Energy Independent LLC*, 2017 Del. Super. Lexis 660 (Del. Super. Dec. 13, 2017); *Peterson v. Delaware Food Corporation*, 788 A.2d 132 (Del. 2001) ("In determining whether there is sufficient evidence to submit a matter to the jury, 'it is improper for the trial judge to weigh the facts or pass on the credibility of the witnesses.' Given the testimony….and given that questions of whether a standard of care has or has not been met are ordinarily jury questions, the trial judge should have submitted the factual issues relating to foreseeability to the jury."); *Rogers, supra.*, fn. 7.

"The role of the trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues." *Merrill v. Crothall – Am., Inc.*, 606 A.2d 96, 99 (Del. 1992). The question is whether any rational fact finder could find, on the record presented to the Court on summary judgment viewed in the light most favorable to the non-moving party, that the evidentiary burden has been satisfied. *Cerberus Int'l. Ltd. v. Apollo Mgmt. LP*, 794 A.2d 1141, 1150 (Del. 2002). This Court has made clear that the standard is whether a "rational" juror could find for the plaintiff, not a "reasonable" juror. *Id.* at 1150-1151.

Importantly, "[t]he judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary

judgment record. The test is not whether the judge considering summary judgment is skeptical that plaintiff will ultimately prevail." *Id.* at 1150 (emphasis added). This Court recently reiterated the principle that issues of breach of duty and comparative negligence are questions of fact for the jury to determine. *Pavik v. George & Lynch, Inc.*, No. 160, 2017, 2018 Del. Lexis 133, at 34-35 (Mar. 23, 2018).

Here, the vice president of social, the person given the authority by the Sorority to organize, plan, and contract for parties, like the one in question, admits that the Sorority did not follow its transportation policy on the evening of Ethan's death and breached its duties owed. Because there is evidence that the Sorority breached its duty to Ethan, summary judgment should have been denied.

II. The Superior Court's fact finding that Ethan proximately caused his own death was not appropriate on summary judgment.

A. Issues of Intervening Cause and Proximate Cause Must be Determined by the Jury.

Because there may be more than one proximate cause of an injury, and Ethan's conduct and injuries were foreseeable to the Sorority if it breached its duty of care to students like him, summary judgment on the issue of causation should have been denied.

Delaware had long recognized that there may be more than one proximate cause of an injury. *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011). The Court-below never determined that Ethan's leaving the party and crossing the road was a superseding cause that would break the chain between the Sorority's negligence and Ethan's injuries. *See Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 829 (Del. 1995) (explaining that a superseding cause is an intervening act which is not foreseeable to the tortfeasor); *Restatement (Second) of Torts section 302*, comment d. It is a matter of common sense that it was foreseeable to the Sorority that if appropriate care was not exercised in transporting students to and from the party, attendees at the event may be injured, including by becoming intoxicated and leaving the party to dangerously walk back to campus. Therefore, even if a finder of fact concluded that Ethan may have been negligent

and a cause of his own death, as the Court-below factually concluded, it does not equate to the nullification of the Sorority's breached duties also being a cause of Ethan's death. Any claimed negligence on the part of Ethan was foreseeable to the Sorority and a result of its own failure to exercise due care. This determination should only be made by a jury: "…[] only where there can be no reasonable difference of opinion as to the conclusion to be reached on the question of whether an intervening cause is abnormal, unforeseeable, or extraordinarily negligent, should the question be determined by the Court as a matter of law. *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 831 (Del. 1995).

In the words of this Court, "[a]n event is foreseeable if a defendant should have recognized the risk of injury under the circumstances. It is irrelevant whether the particular circumstances were foreseeable. *Id.* at 830. Reasonable foreseeability "does not mean that the negligent party ought reasonably to have foreseen a particular consequence or a precise form of injury, or a particular manner of occurrence, or that it would occur to a particular person. *Pitts v. Del. Elec. Coop*, 1993 Del. Super. Lexis 50, at *4 (Del. Super. Jan. 29, 1993). The broad range of foreseeability may be gleaned from decisions like *Robbins v. William H. Porter, Inc.*, 2006 Del. Super. Lexis 201, *3-4 (Del. Super. April 19, 2006) (duty of vehicle owner to protect against theft predicated on foreseeability

that stolen cars will be involved in accidents). Considerations of foreseeability, if disputed, are for the jury to determine. *Pipher v. Parsell*, 930 A.2d at 890, 892 (Del. 2007*); Duphily v. Del. Elec. Coop*, 662 A.2d at 821, 831 (Del. 1995); *Reynolds v. Blue Hen*, 1995 Del. Super. Lexis 323, at *10 (Del. Super. June 19, 1995); *Vadala v. Henkels & McCoy, Inc.*, 397 A.2d 1381, 1383 (Del. Super. 1979). This Court recently reconfirmed that issues of superseding cause present matters of fact for resolution by the jury. *Pavik*, at *34.

The harm that resulted to Ethan was the type of outcome that the Sorority's policies were designed to abate. How then could what occurred the evening of Ethan's death not have been foreseeable to the Sorority? These issues should have been resolved by a jury, not by the Court as a matter of law, and summary judgment should be reversed.

B. Comparative Degrees of Fault Should be Decided by a Jury.

The Superior Court's fact finding conclusion that Ethan's negligence exceeded the Sorority's was an error of law. Delaware's comparative negligence statute provides that a plaintiff's negligence does not bar his claim as long as his negligence does not exceed that of the defendant. 10 *Del. C.* § 8132. Comparative negligence is a fact driven inquiry for the jury. *Tucker v. Albun, Inc.*, 1999 Del. Super. Lexis 468, at *24 (Del. Super. Sept. 27, 1999); *Safee v. Falter*, 1996 Del.

Super. Lexis 21, at *2 (Del. Super. Jan. 25, 1996). Because secondary assumption of the risk is a question of fact to be determined by the jury, "its degree remains a jury question." *Spencer v. Wal-Mart Stores E., Ltd. P'ship*, 930 A.2d 881, 886 (Del. 2007).

As this Court has explained:

> Delaware's modified comparative negligence statute now requires a jury to apportion the degree of liability between the parties to a negligence action in terms of percentages. However, the degree of liability to be apportioned between multiple defendants, or the plaintiffs and the defendant(s), is a separate consideration which should be examined by the jury only after causation has been established. The problem with introducing the term "substantial factor" into the inquiry on causation is that the term "substantial factor" has a quantitative connotation. However, regardless of whether it is the defendant's negligence or the plaintiff's contributory negligence...
>
> It is not how little or how large a cause is that makes it a legal cause, for a proximate cause is any cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred.

Culver v. Bennett, 588 A.2d 1094, 1098-00 (Del. 1991).

In *Koutoufaris v. Dick*, 604 A.2d 390, 393, the plaintiff entered a dark parking lot at night to go to her car. She asked a co-worker to accompany her part of the way to her vehicle. *Id.* After the co-worker left, however, she was assaulted by an unknown assailant in the parking lot. *Id.* This Court affirmed the trial court's decision denying summary judgment and permitting a jury to determine

issues of fault where plaintiff's conduct could be construed as secondary assumption of the risk. *Id.* at 395-98. In the view of this Court, "adoption of a comparative negligence standard in 1984 manifests a legislative intention from that date to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case by case basis." *Id.* at 398. Thus, as in *Koutoufaris*, a jury should be permitted to consider if and to what extent comparative negligence applies.

This Court has more recently confirmed that "…under Delaware's comparative negligence statute the determination of the respective degrees of negligence attributable to the parties almost always presents a question of fact for the jury." *Helm v. 206 Mass. Ave., LLC*, 107 A.3d 1074, 1081 (Del. Supr. 2014). In *Helm*, the Superior Court granted summary judgment where plaintiff admitted that it was unsafe to descend a dark stairway in the rental property but did so anyway. *Id.* at 1078. Despite the plaintiff encountering a known risk, this Court reversed the Superior Court's grant of summary judgment because determination of comparative negligence and secondary assumption of the risk presented questions of fact for resolution by a jury. *Id.* at 1082. The result here should be no different.

In this case, whether the Sorority breached its duties, whether Ethan was

negligent, and if so, whether the Sorority's negligence and Ethan's negligence were proximate causes of Ethan's death, and if so, the degrees of each parties' respective fault, are for the finder of fact, the jury, to decide.

It is often assumed, and taken for granted, the jury's province, and fundamentally, the right to a jury trial. Of course, this right is protected by the *Delaware Constitution*. *Article I, section 4*. "Trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people." *Caudio v. State*, 585 A. 2d. 1278, 1301 (Del. 1991).

Whether a woman renting a house descends a dark staircase recognizing the danger, or a young student under legal age becomes intoxicated at a Sorority party wanders off, both citizens are entitled to have the facts decided by a jury of their peers. The Court-below's fact finding in granting summary judgment on the fact intensive determination that both, the Sorority did not breach its owed duties to Ethan, and also, that Ethan's comparative negligence was the only proximate cause of his death, usurped the role of the jury to decide the facts presented and exceeded the scope of the Court's role in deciding summary judgment. Taking away the jury's province to decide facts and effectively the right to a jury trial, erodes the system of justice not only in personal injury cases like this one, but also in any case involving a jury trial, whether complex commercial litigation, business disputes,

breaches of contract, civil rights cases, or patent litigation. Ethan, like other civil litigants, deserves to have issues of fact resolved by a jury, not the Court.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Appellants' Opening Brief, this Court should reverse the Superior Court's grant of summary judgment to the Sorority and remand for a trial.

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