[Cite as *Wiant v. Ohio Univ.*, 2024-Ohio-4571.]

IN THE COURT OF CLAIMS OF OHIO

WADE WIANT, Admr., et al. Plaintiffs v. OHIO UNIVERSITY Defendant	Case No. 2021-00362JD Judge Lisa L. Sadler DECISION

{¶1} Pursuant to L.C.C.R. 4(D), Defendant's April 2, 2024 Motion for Summary Judgment is fully briefed and before the Court for a non-oral hearing. For the reasons stated below, the Court GRANTS Defendant's motion.

PROCEDURAL BACKGROUND

{¶2} Plaintiffs brought this action after Collin Wiant (Collin), an eighteen-year-old freshman attending Ohio University (OU) in Fall 2018, died as a result of asphyxiation from ingesting nitrous oxide with members of the Sigma Pi Fraternity, Epsilon Chapter (Sigma Pi) at a privately-owned property located off campus.

{¶3} This case was originally stayed pending the resolution of connected actions filed in Athens County Court of Common Pleas against The Sigma Pi Fraternity, International, Inc. and individual fraternity members of Sigma Pi. Once the connected actions settled, the Court lifted the stay in December 2022. Plaintiffs now seek redress from Defendant for the events that caused Collin's death.

{¶4} Specifically, Plaintiffs' complaint alleges that Collin's death was caused by a culmination of hazing that could have been prevented if Defendant had taken steps to reasonably address Sigma Pi's history of hazing. As a result, Plaintiffs assert that (1) Defendant's negligence resulted in Collin's wrongful death on November 12, 2018, and (2) Defendant violated R.C. 2307.44—Ohio's civil hazing statute. Under both claims

in the complaint, Plaintiffs contend Defendant is liable for the injuries that Collin sustained before his death[1] and for those that his next of kin sustained because of his death.[2]

Summary Judgment Arguments and Evidence

{¶5} Upon the parties' motions in anticipation of the dispositive motion deadline, the Court granted the parties leave to file long briefs and extended the briefing schedule given the voluminous amount of discovery.

{¶6} In moving for summary judgment on Plaintiffs' negligence claim, Defendant argued that it owed no duty to supervise Collin's off-campus activities or to protect Collin from the unforeseeable criminal conduct of third parties, and that Collin voluntarily assumed the risks of his illegal drug use. In response, Plaintiffs contend that reasonable minds could differ whether a death was a foreseeable result of Sigma Pi's ongoing culture of hazing and there is a material dispute of fact whether Collin's assumption of the risk bars recovery.

{¶7} As to Plaintiffs' civil hazing claim, Defendant argues it is entitled to summary judgment because it actively enforced a hazing policy at the time of Collin's death, Plaintiffs cannot establish that Defendant knew or should have known that Sigma Pi was hazing Collin, and that Collin was not being hazed when he died. In response, Plaintiffs argue that genuine disputes of fact exist as to whether Defendant was actively enforcing its anti-hazing policy or whether Collin was being hazed at the time of his death, and that the Court would have to weigh evidence or assess credibility to determine whether Defendant knew or reasonably should have known that Sigma Pi was hazing.

{¶8} To support their positions, both parties separately submitted the following evidence: (1) a copy of Corbin Gustafson's September 6, 2023 deposition; (2) a copy of Dr. Jennifer Hall-Jones's May 30, 2023 deposition; (3) a copy of Joshua Androsac's

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[1] "[W]hen an individual is killed by the wrongful act of another, the personal representative of the decedent's estate may bring a survival action *for the decedent's own injuries* . . . ." *Peters v. Columbus Steel Castings Co.*, 2007-Ohio-4787, ¶ 11.

[2] It is well settled that a "wrongful death action does not even arise until the death of the injured person." *Thompson v. Wing*, 70 Ohio St.3d 176, 183 ("Because a wrongful death action is an independent cause of action, the right to bring the action cannot depend on the existence of a separate cause of action held by the injured person immediately before his or her death.").

November 3, 2023 deposition; (4) a copy of Kristen Kardas's June 2, 2023 deposition; (5) a copy of Martha Compton's October 13, 2023 deposition; (6) a copy of Austin Wiant's October 22, 2020 deposition; (7) a copy of Elijah Wahib's October 9, 2019 deposition, (8) a copy of Brinley Zieg's December 2, 2019 deposition; (9) a copy of Cullen McLaughlin's December 5, 2023 deposition; (10) a copy of Aiden Wiant's February 4, 2020 deposition; and (11) a copy of Nicholas Chieffo's November 10, 2023 deposition. The parties also jointly submitted a stipulation as to the authenticity of all data and text messages extracted from Collin's personal cell phone.

{¶9} In support of its motion, Defendant additionally submitted: (1) affidavit of Dr. Jennifer Hall-Jones, including exhibits referenced therein; (2) affidavit of Martha Compton, including exhibits referenced therein; (3) affidavit of Kristen Kardas, including exhibits referenced therein; (4) affidavit of Chief Andrew D. Powers, including exhibits referenced therein; (5) affidavit of Dr. Christian K. Wuthrich, including exhibits referenced therein; (6) a copy of Kathleen Wiant's April 24, 2023 deposition; (7) a copy of Aiden Wiant's November 30, 2023 deposition; (8) a copy of Alex Porshinsky's December 7, 2023 deposition; (9) a copy of Brinley Zieg's August 21, 2023 deposition; (10) a copy of Elijah Wahib's December 21, 2023 deposition; (11) a copy of Victoria Palivoda's November 15, 2023 deposition; (12) a copy of Wade Wiant's April 24, 2023 deposition, including Exhibit S and other exhibits referenced therein; (13) a copy of volume two of Elijah Wahib's October 10, 2019 deposition; (14) Exhibit K, excerpt of Wiant family texts; (15) Exhibit L, excerpt of texts between Collin and A.J. Kauffman; (16) Exhibit M, excerpt of a text chain between Collin and Sigma Pi pledges; (17) Exhibit N, excerpt of texts between Collin and Brinley Zieg; (18) Exhibit O, Plaintiffs' Responses to Defendant's Requests for Admission; (19) Exhibit R, excerpt of texts between Collin and Elijah Wahib; (20) Exhibit S, compilation of text messages from the personal phone of Collin Wiant; and (21) corrected[3] Exhibit W, an Evid.R. 1006 Summary of Evidence Regarding Ohio University's Investigation of Complaints about Sigma Pi.

[3] On July 22, 2024, the Court granted Defendant's unopposed motion for leave to file a corrected version of Exhibit W. Accordingly, the Court will limit its review to the corrected version of Exhibit W filed on May 21, 2024 and will not consider the Exhibit W erroneously filed on May 20, 2024.

{¶10} In opposition to Defendant's motion, Plaintiffs also submitted: (1) a copy of Kristen Kardas's September 21, 2023 deposition; (2) a copy of Dr. Jennifer Hall-Jones's September 11, 2023 deposition; (3) a copy of Zach Garrett's December 19, 2019 deposition; (4) a copy of Gavin Dassatti's January 8, 2020 deposition; (5) a copy of Andrew Davidson's January 10, 2020 deposition; (6) a copy of Elizabeth Frecker's August 1, 2023 deposition (7) a copy of Louis Dytko's December 18, 2019 deposition; and (8) a copy of Joe Hammerly's January 10, 2020 deposition; (9) affidavit of Norman J. Pollard, ED.D., including exhibits referenced therein; (10) Exhibit 2, which includes (a) Defendant's Responses to Plaintiffs' Third Set of Interrogatories Nos. 9-12, 16, (b) a November 12, 2013 email from Kristen Kardas to Chief Andrew Powers, (c) July 30, 2024 Hazing Task Force Final Recommendations Report, and (d) July 24, 2014 Ohio University Hazing Policy Final Recommendation; (11) affidavit of Nick Chieffo, including exhibits referenced therein; (12) Exhibit 4, Athens County Emergency Medical Services (EMS) Report; and (13) Exhibit 5, Athens County Coroner Verdict.

Defendant's May 21, 2024 Motion to Strike

{¶11} On a related matter, Defendant filed a motion to strike various portions of Plaintiffs' response because they untimely filed certain supporting evidence. Upon review, the Court will not limit its consideration of Plaintiffs' response or supporting evidence and it will render its determination on the merits. While there was a delay in Plaintiffs filing various depositions, Defendant does not indicate that it was surprised or otherwise inconvenienced by such untimeliness. Plaintiffs timely filed their response, which informed Defendant of Plaintiffs' arguments in opposition and identified the depositions on which Plaintiffs were relying to support those arguments. Additionally, Defendant specifically addressed those arguments in its reply in support of its motion for summary judgment. The Court finds no prejudice against Defendant or any other persuasive reason to strike portions of Plaintiffs' opposition or the evidence on which they rely. Accordingly, the Court DENIES Defendant's May 21, 2024 motion to strike.

Defendant's July 18, 2024 Motion to Strike

{¶12} After both parties informed the Court at the July 16, 2024 pretrial conference that they were ready to proceed to trial, Plaintiffs filed a "Notice of Voluntary Dismissal Without Prejudice of Count One (Negligence) Only" pursuant to Civ.R. 41(A) on July 17, 2024, approximately three weeks before the trial was scheduled to commence. Reactively, Defendant filed a motion to strike Plaintiffs' notice on the grounds that Civ.R. 41(A) does not allow a party to partially dismiss only one claim among others against the same defendant. Additionally, Defendant argues that it would be prejudiced if the Court permitted Plaintiffs to amend their complaint to remove their negligence claim this close to trial given the resources expended to defend against Plaintiffs' negligence claim.

{¶13} In response, Plaintiffs argue that Civ.R. 41(A) permits a court to issue an order dismissing only one claim "upon such terms and conditions as the court deems proper" and attempt to reframe their filing as a motion under Civ.R. 41(A)(2) instead of a notice under Civ.R. 41(A)(1). Plaintiffs also acknowledge that courts disfavor a dismissal without prejudice of a singular claim due to the risk of piecemeal litigation. To this end, Plaintiffs alternatively request that the Court

> (1) construe Plaintiff's Notice of Voluntary Dismissal as a withdrawal of Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment with regards to the Negligence Claim only; (2) grant Defendant's motion for summary judgment as to the negligence claim only; (3) dismiss Plaintiff's claim with prejudice; and (4) proceed to trial on Plaintiff's remaining claim under Ohio's Civil Hazing Statute, R.C. 2307.44.

For the reasons that follow, the Court STRIKES Plaintiffs' July 17, 2024 notice but the Court will allow Plaintiffs'—at their explicit behest—to withdraw their opposition to summary judgment with regards to their negligence claim.

{¶14} Civ.R. 41—also known as "Rule 41. Dismissal of Actions."—provides for the dismissal of actions. Given the plain language of the rule and the general policy against piecemeal litigation, it is well settled that "Civ.R. 41(A) applies to discrete parties, not discrete causes of action." *Pattison v. W.W. Grainger, Inc.*, 2008-Ohio-5276, ¶ 18 (collecting cases). While Plaintiffs contend that Civ.R. 41(A)(2) permits a court to dismiss "a claim" when deemed proper, the Court finds that "a motion to voluntarily dismiss less

than all the claims in a multi-count complaint is properly treated as an amendment under Civ.R. 15(A)." *Lewis v. J.E. Wiggins & Co.*, 2004-Ohio-6724, ¶ 17 (10th Dist.).

{¶15} Although Civ.R. 15(A) is generally construed liberally in favor of allowing amendment when such leave is requested, a court has the discretion to deny leave and should refuse leave "'if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party.'" *Nationwide Mut. Ins. Co. v. Am. Elec. Power*, 2008-Ohio-5618, ¶ 18 (10th Dist.), quoting *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 99 (1999). Under the circumstances, justice does not require the Court to freely grant Plaintiffs leave to amend their complaint this late in the proceedings. Accordingly, the Court GRANTS Defendant's July 18, 2024 motion to strike.

{¶16} To fully resolve this procedural quagmire, however, the Court in the interest of justice construes subpart (1) of the alternative request set forth in Plaintiffs' July 23, 2024 response as a motion for partial withdrawal.[4] *See State v. Schlee*, 117 Ohio St.3d 153, ¶ 12 (2008) (generally trial courts may recast irregular filings "into whatever category necessary to identify and establish the criteria by which the motion should be judged."). In accordance with Plaintiffs' express pleadings and in the interest of judicial economy, the Court GRANTS, in part, the July 23, 2024 motion for partial withdrawal and notes that Plaintiffs' opposition to summary judgment as to the negligence claim is WITHDRAWN. Therefore, the Court will determine whether summary judgment is appropriate with the understanding that Plaintiffs oppose the Court rendering summary judgment on their statutory hazing claim but do not oppose the Court rendering summary judgment on their negligence claim. *See* Civ.R. 56(E) ("If the party does not so respond, summary judgment, *if appropriate*, shall be entered against the party.").

[4] The Court acknowledges that Plaintiffs frame their alternative request to include four subparts. Despite the compound phrasing, the Court finds that the latter three subparts contain premature requests. Regarding subparts (2) and (3), the Court is required to review and conclude that Defendant is entitled to judgment as a matter of law before rendering summary judgment and dismissing Plaintiffs' negligence claim with prejudice. *Hooten v. Safe Auto Ins. Co.*, 2003-Ohio-4829, ¶ 43 ("The lack of an adequate response to a motion for summary judgment by a [n]onmoving party does not entitle the moving party to summary judgment."). Similarly, subpart (4) is merely a reiteration of Plaintiffs' continued opposition to summary judgment as to the statutory hazing claim that requires the Court to first consider Defendant's Motion for Summary Judgment. To contrast, subpart (1) begets a new-found motion that requires this Court's consideration in advance of ruling on Defendant's Motion for Summary Judgment. Therefore, the Court declines to conjunctively recast all subparts when construing the motion for partial withdrawal.

STANDARD OF REVIEW

{¶17} Courts review motions for summary judgment under the standard set forth in Civ.R. 56(C), which states, in part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

"[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of material fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). To meet this initial burden, the moving party must be able to point to evidentiary materials of the type listed in Civ.R. 56(C). *Id*. at 292-293.

{¶18} If the moving party meets its initial burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings," but has a reciprocal burden to file a response which "must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). It is well-established that courts should not render summary judgment unless,

> construing the evidence most strongly in favor of the nonmoving party: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party.

Robinette v. Orthopedics, Inc., 1999 Ohio App. LEXIS 2038, *7 (10th Dist. May 4, 1999). When considering whether summary judgment is appropriate, the court cannot weigh the evidence or determine the credibility of witnesses. *Grubach v. Univ. of Akron*, 2020-Ohio-3467, ¶ 40 (10th Dist.). Before awarding summary judgment, the court should take caution and "resolve any doubt in favor of the non-moving party." *Darden v. City of*

Columbus, 2004-Ohio-2570, ¶ 10 (10th Dist.), citing *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356 (1992).

RELEVANT FACTS

{¶19} At the outset, the Court acknowledges that this case concerns a devastating tragedy that involved events for which Collin's family and friends have the Court's deepest sympathy. To this end, this Court will not detail every fact about Collin's background and experience at OU. Despite the voluminous amount of evidence submitted, the parties in large part do not dispute the material facts of this case. After extensively reviewing every piece of evidence in Plaintiffs' favor, the Court recapitulates below only those facts relevant to determining whether summary judgment is appropriate.[5]

OU's Policies Against Hazing

{¶20} The evidence shows that, at all times relevant to this case, Defendant has explicitly prohibited misconduct that endangered students' health and safety through OU's formal, written policies. With specific regard to prohibiting hazing, the 2014 version of OU's Student Code of Conduct (SCC) contained policies that prohibited students to engage in any conduct that caused or had the potential to cause bodily harm to another, including "coercing another to engage in an act of membership in a student organization that causes or creates a substantial risk of mental or physical harm to any person (e.g. hazing)." Other policies contained therein also prohibited any conduct involving the misuse of illegal drugs, narcotics, marijuana, or alcohol.

{¶21} At that time, the Office of Community Standards & Student Responsibility (OCSSR) handled roughly 2,500 cases concerning various types of misconduct per year. To enhance its prohibition on hazing in the SCC, Defendant created the Anti-Hazing Policy Creation Task Force (the task force) in 2014 designed to further address hazing issues. To this end, members of this task force attended the Novak Institute for Hazing Prevention in June 2014. In 2015, Defendant adopted a new version of OU's SCC which

[5] *See generally State ex rel. Digiacinto v. Indus. Commn. of Ohio*, 2020-Ohio-707, ¶ 16 (it is not generally required to discuss every piece of evidence submitted because it is presumed that all evidence has been considered; however, if all evidence has been discussed except for a particular piece of evidence, the court will presume that particular piece of evidence was overlooked).

separately delineated hazing into its own category among the various forms of prohibited conduct. Other categories of prohibited conduct continued to forbid any behavior involving academic misconduct and the misuse of illegal drugs, narcotics, marijuana, or alcohol.

{¶22} In February 2017, Defendant additionally adopted University Policy 23.010: Hazing (OU's formal anti-hazing policy) after the task force recommended that OU supplement the SCC's prohibition on hazing with a stand-alone policy. Later that year, Defendant also updated the hazing provision of the SCC to incorporate OU's formal anti-hazing policy. Additionally, the updated SCC included "[a]cts of sexual misconduct, relationship violence, or stalking" as a prohibited act of hazing, as well as continuing to prohibit any academic misconduct and the illegal possession or misuse of alcohol, marijuana, and other controlled substances among the other categories of prohibited conduct.

{¶23} OU's formal anti-hazing policy prohibits any form of hazing and it "holds students accountable for their behavior both on and off campus" for the duration of their enrollment, "including breaks in the academic year." If a complaint of potential hazing is submitted, the OCSSR investigates and resolves all hazing allegations in accordance with the conduct process contained in OU's SCC. Violations of this policy may be punished by the full range of sanctions permitted under the SCC: reprimand, disciplinary probation, suspension, and expulsion. Additionally, OU may require additional educational activities be completed as a condition of any imposed sanction.

{¶24} Although OU will accept anonymous complaints of misconduct, both OU's formal anti-hazing policy and the SCC also warn that "the university's ability to obtain additional information may be compromised and the ability to investigate anonymous reports may be limited." Notwithstanding, the SCC provides that OU "will exercise due diligence to address the concerns identified . . . to the extent possible with available information" when the complaint contains "sufficiently detailed information about conduct that would constitute a violation" of its policies.

{¶25} In accordance with the SCC, the OCSSR would initiate and enforce the conduct process by balancing the due process rights of students with the need to respond appropriately to reports of misconduct. When allegations of misconduct occurred, the

OCSSR's first goal was to determine whether there was an immediate safety risk and what actions needed to be taken to mitigate any safety concerns. The next goal was to determine what happened, whether it violated a policy, and how to respond to any suspected violation.

{¶26} When reports of hazing were made, the OCSSR reviewed all reported allegations, initiated a formal investigation into hazing allegations when appropriate, and recommended or implemented sanctions when the hazing allegations could be substantiated. If the OCSSR determined a report of hazing did not warrant formal investigation, a staff member from the OCSSR or the Campus Involvement Center (CIC) would hold "an educational conversation with the president of the reported student organization to discuss the report and strategies to encourage behavior consistent with the [SCC]."

{¶27} If a report warranted formal investigation, the OCSSR would formally investigate to discover whether sufficient information existed to indicate that misconduct occurred. Whether students were interviewed during a formal investigation was determined on a case-by-case basis and was not always possible depending on how much information was given. The OCSSR did not force students reporting violations to come in for interviews or to file a formal report. Students were only required to come in if they were charged with a violation.

{¶28} If sufficient information was found, the OCSSR would refer the case to an appropriate hearing authority which could be an OCSSR staff member or OU's Hearing Board. The OCSSR could impose the full range of sanctions including disciplinary suspension or expulsion whereas OU's Hearing Board could recommend sanctions to the dean of students or designee who would then impose the sanction.

{¶29} Regardless, the hearing authority would meet with the accused individual or organization. If the accused accepted responsibility, the OCSSR would implement an appropriate sanction to address the misconduct. If the accused denied responsibility, the hearing authority would determine whether there was enough evidence to warrant a sanctions hearing.

{¶30} If the hearing authority believed there was actionable evidence, it would schedule a sanction hearing and present the evidence in front of a hearing officer or OU's

Hearing Board. If the hearing officer or OU's Hearing Board determined there was sufficient evidence to hold the accused responsible, the hearing officer would decide and implement an appropriate sanction or OU's Hearing Board would recommend an appropriate sanction to the dean of students or designee who would either implement the recommended sanction or implement a different sanction deemed appropriate.

{¶31} In addition to its written policies and disciplinary procedures regarding all prohibited conduct, Defendant took steps to educate its students and staff about OU's formal anti-hazing policy and the dangers of hazing. In March 2017, Defendant hosted Gentry McCreary of Dyad Strategies, a nationally recognized expert on hazing and student organization investigations, to conduct a collaborative training with various OU staff members from the OCSSR and the CIC to learn about hazing investigation, adjudication, and prevention. Defendant also recognized National Hazing Prevention Week in September 2017.

{¶32} Also in September 2017, Defendant invited McCreary back to educate and train OU students and staff members about hazing. As a part of this training, McCreary gave a keynote address titled "The Five Great Hazing Myths," which was open to all OU students and staff to attend. McCreary also conducted a separate anti-hazing workshop specifically designed for the CIC's Sorority and Fraternity Life Division (Greek Life), which Defendant required fraternity and sorority presidents, new member educators, and other officers to attend. Thereafter, Defendant required fraternity and sorority student leaders to attend a similar seminar in March 2018 when Dr. Lori Hart presented a "Complex Problems & Simple Solutions Risk Management Training for Fraternity and Sorority Leaders" which included a review of OU's formal anti-hazing policy and the various conduct that constitutes hazing.

{¶33} Defendant again recognized National Hazing Prevention Week in September 2018. During this week, OU's Interfraternity Council hosted the "Values Presentation & Bid Distribution" and the "Hazing Prevention Event" in effort to educate incoming prospective fraternity members about the general values of the Greek Life community and OU's formal anti-hazing policy.

OU's History with Sigma Pi

{¶34} The record is void of any reported misconduct involving Sigma Pi until several complaints of potential hazing were reported during the 2013-2014 school year. First, Kristen Kardas—Defendant's former Assistant Director for Greek Life—received an anonymous complaint in November 2013 potentially involving Sigma Pi, but Defendant ultimately did not initiate the conduct process because of insufficient information in the report due to the lack of names, dates, or locations provided. Nonetheless, Kardas did provide the reporting student with the contact information for the anti-hazing hotline and forwarded the report to Chief Powers with the Ohio University Police Department (OUPD).

{¶35} On February 23, 2014, Dr. Jennifer Hall-Jones—Defendant's former Dean of Students and Senior Associate Vice President for Student Affairs—received an email with an anonymous report about potential hazing at an off-campus house on Franklin Street where members of Sigma Pi may have lived. After review, the OCSSR did not initiate an investigation because the report involved an off-campus incident for which none of the details could be confirmed at the time nor could the OCSSR establish whether the name used by the anonymous reporter was the real name of a student.

{¶36} On March 7, 2014, Dr. Hall-Jones received an anonymous email from a student explaining that he was pledging Sigma Pi and asking to meet in person because he was being hazed. Dr. Hall-Jones responded the next business day to set up a meeting with him to offer support, guidance, and connect him with the proper resources to help. When the student did not follow up for over a week, Dr. Hall-Jones attempted to contact the reporting pledge again on March 19, 2014, but again received no response. When Dr. Hall-Jones did receive email responses from the pledge, the pledge detracted from his March 7, 2014 email and asked Dr. Hall-Jones to disregard his previous statements.

{¶37} In this same timeframe, Defendant also learned of an incident at Burr Oak State Park regarding an event sponsored by Sigma Pi that involved alcohol, illegal drugs, and other inappropriate behavior. On March 25, 2014, the OCSSR issued an order to Sigma Pi to cease and desist all chapter activity and notified Sigma Pi that it was initiating an investigation into allegations regarding hazing and related misconduct. Following the OCSSR's investigation, Sigma Pi accepted responsibility for hazing in violation of the SCC's prohibition against causing bodily harm to others.

{¶38} As a result, the OCSSR placed Sigma Pi on probation until May 3, 2015. Additionally, Sigma Pi was required to develop two new member activities that reflected the organization's values and to perform a community service project, both of which were completed successfully. There were no reports of misconduct involving Sigma Pi during the probation period.

{¶39} On April 19, 2015, the CIC assessed Sigma Pi as a "silver-level organization" for its performance in the Administrative and Membership categories of OU's Sorority & Fraternity Life Standards and Expectations process. In the same report, the CIC also advised Sigma Pi that improvement in the remaining categories could be achieved by "fulfilling all sanctions with the University's conduct office, completing all requirements from the Interfraternity Council, attending every monthly All-Council meeting, hosting a philanthropic event each semester, creating/submitting a crisis management plan, and submitting documentation of any developmental/educational programs held for members or the campus community."

{¶40} In November 2015, the OCSSR discovered that the Alpha Gamma Delta sorority was holding unregistered social events and providing alcohol to its members, including those under the legal drinking age. Based on information obtained from the sorority members' social media posts, the OCSSR believed that some of those social events were held in conjunction with fraternities, one of which was Sigma Pi. Because the fraternities were also suspected of providing alcohol to their own members as well as the sorority members at these social events, staff from the OCSSR and the CIC discussed initiating the conduct process to determine whether the fraternities were distributing alcohol or hazing in connection with these social events. While it appears the OCSSR did not pursue discipline against the suspected fraternities, it did issue a cease-and-desist letter to the sorority and thereafter placed the sorority on probation.

{¶41} In December 2015, the City of Athens Code Enforcement Department (Code Enforcement)—which handles municipal ordinance violations such as trash and noise complaints—requested Dr. Hall-Jones help with numerous issues occurring at 45 Mill Street in Athens (45 Mill St.), a privately-owned property located off campus. Code Enforcement explained that they were having issues with voluminous code violations occurring at this property and that there was a lawsuit between the tenants and the

landlord over the damages to the property. After seeking additional information, Dr. Hall-Jones learned that the property was being rented by members of Sigma Pi. Kardas specifically informed Dr. Hall-Jones that the university could not take action because 45 Mill St. was not officially registered with OU as fraternity-affiliated property and she believed that the current tenants had not renewed the lease for the following year.

{¶42} Although 45 Mill St. was commonly known as a party house by both OU students and CIC staff, the property was not always occupied by members of Sigma Pi and members of Sigma Pi lived at various other locations off campus. Nonetheless, it was common for students from any organization—i.e., the same sorority, fraternity, sports team, musical ensemble, etc.—to rent off-campus properties together and those locations could change from year to year. While some Greek Life organizations chose to fulfill various requirements to have an off-campus property officially recognized by OU as a fraternity or sorority house, Sigma Pi did not undergo this process for 45 Mill St. and the property did not display the Greek letters of the fraternity. At one point in time when Kardas was aware that Sigma Pi members rented and occupied 45 Mill St., she tried to work with Sigma Pi to establish it as an officially recognized property capable of being held to OU's standards but was ultimately unsuccessful.

{¶43} In September 2016, an OU graduate assistant reported to the OCSSR that a freshman student had missed a one-on-one meeting and missed class but had emailed to explain he had missed the meeting and class because he was cleaning the fraternity house. At an in-person meeting regarding the absence, the graduate assistant saw that the student had a cut under his chin. When asked, the student said he could not remember how he got cut. The student also explained that it was a late night for initiation, and he brought up being tired because it was "fraternity week."

{¶44} Upon review of the report, the OCSSR discovered that this freshman was pledging Sigma Pi and initiated an investigation based on the allegations in the complaint. An OCSSR staff member met with the student who then recalled that he got the cut on his chin after tripping over his own feet while walking home intoxicated and explained that he did not want to tell the graduate student he had been drinking so he just said that he did not remember. The student also clarified that he misstated "fraternity week" when he meant to say that he was tired from "rush week" being very busy with lots of events.

Regarding cleaning the fraternity house, the student stated that he thought it would be better to tell the graduate student that he was doing something for the fraternity instead of telling the truth that he lost track of time playing video games with one of the fraternity brothers. The student adamantly denied that anyone at the fraternity forced or even asked him to clean. At the end of the meeting, the OCSSR staff member talked through different examples of hazing so that he would know if he ever encountered it.

{¶45} The OCSSR also notified the Sigma Pi student president at the time about the graduate assistant's report and warned about the implications of asking new members to do menial work or anything that could be seen as demeaning, dangerous, or setting them apart based on their status. An OCSSR staff member talked through some examples of hazing and the president asked for clarification about group projects and whether the new members making something for the chapter or picking a theme for Halloween costumes and wearing them to the annual block party would be considered hazing. The OCSSR staff member was confident that the student president at the time was "very clear about the definition and risks of hazing." Following the investigation, the OCSSR pursued no charges against Sigma Pi.

{¶46} After the 2016 investigation closed, Defendant did not receive any reports of hazing involving Sigma Pi for the remainder of 2016. Likewise, Defendant did not receive any reports of hazing involving Sigma Pi in 2017[6] or 2018 until after Collin's death. Specifically in 2018, the only record Defendant had involving Sigma Pi before Collin's death include the student president of Sigma Pi, Elijah Wahib, attending the required March 26, 2018 Risk Management Training for Fraternity and Sorority Leaders and Collin attending both of the mandatory anti-hazing presentations on September 16, 2018 and September 19, 2018. When the OCSSR became aware after Collin's death that hazing may have occurred, Defendant issued a cease-and-desist letter to Sigma Pi and began an investigation after which OU expelled Sigma Pi.

[6] For purposes of completeness, the Court notes that the record contains a stray, "unclear" memo which mentions that a mother of a former Sigma Pi member called to report that her son was mugged. While the memo is dated February 2017, it is unclear when the phone call actually took place and whether hazing was involved. Moreover, this stray notation is not put in context or authenticated by any other evidence and the parties do not point the Court to this fact in their arguments.

Collin at OU

{¶47} In Fall 2018, Collin enrolled at OU as an eighteen-year-old freshman. Soon thereafter, Collin decided to pledge Sigma Pi, expressing excitement to certain family members that he was "going Sig Pi". According to Collin's text messages, active members of Sigma Pi told Collin and a friend that they would be hazed once they were pledges, but that they would "def get through it." Collin relayed this conversation to his cousin on September 13, 2018, and explained that "the hazing is gonna be ass" but that he "got 2 good friends going so I won't drop like a bitch".

{¶48} On September 15, 2018, Collin received his informal bid to join Sigma Pi and bragged to family that he was "first to get a bid" while also being aware that the official bid reveal sanctioned by OU was not until the afternoon on September 16, 2018. To accept his bid, Collin attended the required "Values Presentation and Bid Distribution" hosted by OU's Interfraternity Council on September 16, 2018. During National Hazing Prevention Week, Collin also attended the required Hazing Prevention Event on September 19, 2018 hosted by OU's Interfraternity Council. After becoming an initiate, Collin eventually became his pledge class's president.

{¶49} After taking an early-October trip to Gatlinburg, Tennessee with members of Sigma Pi, Collin texted his ex-girlfriend that he had the "greatest weekend" because he "got to do free coke weed and aderal constantly mixed with moonshine and endless alcohol constantly blacked out" but that the weekend was also "lowkey one of the suckiest at the same time" because he "got egged one night and belted and punched" during that trip. By mid-October, Collin was encouraging his fellow initiates to endure the hazing with sentiments like: "Bro let em haze us", "The hazing won't kill us. It's just time passing by. We some fucking dogs", and "Boys we are tougher than the hazing". Somewhere along the line, Collin's parents noticed changes in his personality, class attendance, and grades. Additionally, Collin told his brothers that he was being hazed.

{¶50} After meeting at a party hosted by Sigma Pi at 45 Mill St., a female student reported to OUPD that Collin sexually assaulted her on October 19, 2018. After OUPD interviewed Collin where he made several admissions, OUPD initiated a criminal investigation into Collin for sexual assault. Upon learning about the pending sexual assault investigation, Wahib told Collin that he was not to be affiliated with Sigma Pi.

Thereafter, other Sigma Pi members were also informed that Collin was suspended from the pledge class due to the criminal investigation and that he could not be affiliated with any Sigma Pi activity. Notwithstanding, Wahib gave Collin permission to continue to frequent 45 Mill St.

{¶51} On November 11, 2018, Collin was at Crystal Bar in Athens with friends. After receiving a text to meet at 45 Mill St., Collin left the bar with a Sigma Pi member named Gustafson. As they were leaving, Collin told an unaffiliated friend that he believed he was going to get hazed. On the way, Collin and Gustafson stopped at Collin's dorm before arriving at 45 Mill St. around 2:00 a.m. on November 12, 2018. Once inside, they initially joined Sigma Pi members Androsac and McLaughlin, and a female guest that was intoxicated to the point of being "blacked out" who Androsac eventually had to carry home.

{¶52} Also present at 45 Mill St. were 100 canisters of nitrous oxide that Androsac had purchased earlier in the night. Uncontroverted deposition testimony establishes that the whippets were available to anyone, fraternity and non-fraternity members alike, who wanted to participate that night. Those in the room with Collin also deponed that they were not engaged in an official or unofficial fraternity event and that Collin was neither being hazed nor did anyone force, coerce, or otherwise instruct Collin to take the whippet.

{¶53} Nevertheless, Androsac provided the nitrous oxide to Collin who began "gasping" for air after ingestion and turned "purple and blue." Around 2:55 a.m., EMTs arrived at 45 Mill St. and reported that Collin was found "lying supine on floor beside bed in small bedroom" and was "cyanotic, pulseless, and apneic." Collin later died at O'Bleness Memorial Hospital at approximately 3:34 a.m. after which the Athens County Coroner's Officer determined Collin's cause of death to be asphyxiation due to nitrous oxide ingestion. Thereafter, individual fraternity members were charged with and pleaded guilty to various criminal offenses related to the events leading to Collin's death.

LAW AND ANALYSIS

{¶54} After viewing the evidence in a light most favorable to Plaintiffs, the Court finds no genuine disputes of material fact. *See Mitchell v. Mid-Ohio Emergency Servs., LLC*, 2004-Ohio-5264, ¶ 12 (10th Dist.), citing *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 ("In the summary judgment context, a 'material' fact is one that might

affect the outcome of the suit under the applicable substantive law. When determining what is a 'genuine issue,' the court decides if the evidence presents a sufficient disagreement between the parties' positions."). To the extent any arguable dispute existed, the Court resolved it in Plaintiffs' favor. Furthermore, the Court's review did not require weighing the evidence or determining credibility. *See O'Day v. Webb*, 29 Ohio St.2d 215, 219 (1972) ("a review of the evidence is more often than not vital to the resolution of a question of law. But the fact that a question of law involves consideration of the facts or the evidence does not turn it into a question of fact. Nor does that consideration involve the court in weighing the evidence or passing upon its credibility."). Instead, this case requires the Court to determine if reasonable minds could come to different conclusions whether these undisputed facts entitle Defendant to judgment as a matter of law.

{¶55} It remains well settled that it is "the duty of a trial court to withhold an essential issue from the [trier of fact] when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue" and "if the finding on that one issue disposes of the whole case, a duty arises to grant judgment upon the whole case." *See O'Day*, 29 Ohio St.2d at 220 ("In other words, if all the evidence relating to an essential issue is sufficient to permit only a conclusion by reasonable minds against a party, after construing the evidence most favorably to that party, it is the duty of the trial court to instruct a finding or direct a verdict on that issue against that party."). Plaintiffs' arguments in opposition to summary judgment appear to imply that the unique circumstances of this case inherently create triable issues of fact, but it is the Court's position that determining the sufficiency of evidence is a question of law. *See id.* (when determining whether sufficient evidence exists to permit reasonable minds to reach different conclusions about an issue, "a court is repeatedly called upon to consider, review and assess the evidence in the record. But questions relating to the failure to discharge those duties properly are questions of law.").

{¶56} Because both claims require discussing the traditional negligence standard of knowledge—i.e., whether Defendant knew or reasonably should have known of the hazing or its potential to result in injury—the Court will first address Plaintiffs' negligence claim.

First Claim: Negligence

{¶57} To prevail on their negligence claim, Plaintiffs must show that (1) Defendant owed a duty, (2) Defendant breach its duty, and (3) Defendant's breach proximately caused Plaintiffs' injury. *Shivers v. Univ. of Cincinnati*, 2006-Ohio-5518, ¶ 6 (10th Dist.). Summary judgment is appropriate when the Court determines that Defendant is entitled to judgment as a matter of law regarding any one element. *See generally Ford v. Complete Gen. Constr. Co.*, 2006-Ohio-6954, ¶ 12 (10th Dist.) ("failure of proof with respect to any one prong renders immaterial disputes of fact with respect to other prongs.").

{¶58} The existence and scope of duty are questions of law dependent on the relationship between the parties. *Shivers* at ¶ 6. When ascertaining the appropriate standard of care that a party owes to another, "[a]ny number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall." *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). However, Ohio law ordinarily does not impose a "duty to prevent a third party from causing harm to another absent a special relationship between the parties or a duty imposed by statute." *A.M. v. Miami Univ.*, 2017-Ohio-8586, ¶ 34 (10th Dist.).

{¶59} Plaintiffs' complaint alleges that Defendant had a duty to protect Collin from Sigma Pi given the fraternity's history of hazing and related misconduct. While Defendant acknowledges that Collin, as a student, would maintain a special relationship with Defendant as a business invitee during university activities or while located on premises under OU's possession and control, Defendant disputes that this special relationship existed at the time of Collin's death. Instead, Defendant argues that "a university does not have the same duty of care to warn or protect students from the criminal acts of a third party once they leave campus or a premises that is under the institution's possession or control." *Meola v. Ohio State Univ.*, 2023-Ohio-3805, ¶ 15 (10th Dist.) (the court found that no duty to protect from third-party, criminal acts when the university had suspended its association with the fraternity at the time the harm occurred and did not own the premises where the fraternity hosted the party). Upon review, the Court finds that

reasonable minds could come to but one conclusion that Collin was not a business invitee of Defendant while at 45 Mill St.

{¶60} The parties agree that Collin was at 45 Mill St. the night he died. The parties also agree that 45 Mill St. is a privately owned, off-campus property that was not under Defendant's direct possession or control. While it was commonly known that members of Sigma Pi rented 45 Mill St. during Fall 2018, it is not disputed that the property was not exclusively affiliated with Sigma Pi and was leased by individuals not affiliated with the fraternity. While OU staff had discussions about Sigma Pi completing the formal process for OU to officially recognize 45 Mill St. as a fraternity-affiliated property, it is undisputed that these efforts were unsuccessful. The Court does not find that this attempted and unsuccessful endeavor constitutes an exercise of possession or control such that OU would incur liability for the third-party, criminal acts that took place at 45 Mill St. as a matter of law. *See, e.g., Meola* at ¶ 19 ("There is no claim that OSU had ever exercised possession or control over the fraternity house. Appellants posit that OSU had control over the premises because it can discipline students for off-campus behavior. However, we do not believe that an institution's disciplinary authority over its students amounts to possession and control over a privately owned premises located off campus."). Moreover, Defendant's lack of possession or control is further demonstrated by its inability to assist Code Enforcement with the municipal code violations that had occurred at 45 Mill St. because it had no relationship with the property.

{¶61} Because Collin was not on campus or otherwise located on premises under Defendant's control or possession, Defendant had no duty to shield him from the harmful off-campus activity of others. *See Meola* at ¶ 15; *see also A.M.* at ¶ 35, 39 ("we find no legal support that Ohio has [elected] to impose a duty in negligence on a higher education institution with regard to its students which reaches beyond university activities or premises under its possession and control."). Furthermore, this Court can find no Ohio authority supporting the conclusion that a university acts *in loco parentis* with respect to its students or otherwise has a legal obligation to regulate or supervise the private lives of its students or their associations. *Evans v. Ohio State Univ.*, 112 Ohio App.3d 427, 737 (10th Dist.1996).

{¶62} Therefore, this Court will not deviate from the well-settled law which has long "characterized the student-university relationship in business terms" and declined "to impose a duty in negligence on a higher education institution with regard to its students which reaches beyond university activities or premises under its possession and control." *A.M.* at ¶ 39-40. Based on this alone, the Court may render summary judgment as to Plaintiffs' negligence claim. Given the unique circumstances herein, however, the Court will also address the issues of foreseeability and breach.

{¶63} Assuming arguendo that a special relationship continued to exist between Defendant and Collin after he left campus property, it remains well settled that "a university is not an insurer of its students' safety." *Shivers* at ¶ 6. As a general matter, liability turns on the "foreseeability of injury" and whether "defendant knew or should have known" that harm would result from its actions or omissions. *Huston v. Konieczny*, 52 Ohio St.3d 214, 217 (1990). Even when criminal conduct occurs on university premises, a university will not be liable for the resulting injuries unless the third party's criminal act was foreseeable. *Shivers* at ¶ 6.

{¶64} A criminal act is foreseeable when, under the totality of the circumstances, "a reasonably prudent person would have anticipated an injury was likely to occur." *Id.* at ¶ 7. When examining the totality of the circumstances, courts generally consider "prior similar incidents, the propensity for criminal activity to occur on or near the location, and the character of the business." *Id.* However, a criminal act is not foreseeable as a matter of law if the evidence shows: "(1) spatial separation between previous crimes and the crime at issue; (2) difference in degree and form between previous crimes and the crime at issue; and (3) lack of evidence revealing defendant's actual knowledge of violence." *Id.* at ¶ 9. Moreover, "the totality of the circumstances must be 'somewhat overwhelming' in order to create a duty" because criminal conduct is largely unpredictable. *Id.* at ¶ 7. For circumstances to be "somewhat overwhelming" the evidence must demonstrate "something greater than the general knowledge of potential crimes." *Id.* at ¶ 10.

{¶65} Initially, the Court notes that Plaintiffs do not argue that Defendant had actual knowledge. Indeed, it is not disputed that various individuals close to Collin knew that he was being hazed and did not report it to any OU employee or law enforcement. The record is also void of any complaint of hazing involving Sigma Pi following September

2016 until after Collin's death in November 2018. Because the parties agree that OU did not have actual knowledge of any hazing in Fall 2018, the Court instead examines whether Defendant should have known that Collin was being hazed.

{¶66} While Plaintiffs contend that Sigma Pi hazing in Fall 2018 was foreseeable because Sigma Pi had a "deeply engrained culture" of hazing, the Court finds insufficient evidence to support this conclusion. Although it is undisputed that the members of Sigma Pi in 2014 were engaged in hazing, those members accepted responsibility and were punished in accordance with OU's policies in existence at that time. Following 2014, however, there are no verifiable allegations of hazing involving Sigma Pi. *See generally Dresher* at 293 (conclusory assertions are not sufficient to satisfy the summary judgment standard). Notably, there is a two-year lapse in time from 2016 to 2018 without any reports of hazing involving Sigma Pi whatsoever.

{¶67} The record is also void of any evidence that shows that any member of Sigma Pi who was involved in the hazing in 2014 continued to be a member into 2018 to be able to carry forward such a culture of hazing. Although testimony demonstrated that notorious traditions can be passed down through members without their continued presence, there is not one report after Sigma Pi's probation was lifted in 2015 that contained similarly sufficient allegations of hazing compared to those received in 2014. The OCSSR specifically initiated an investigation based on the graduate assistant's September 2016 report and determined that charges for hazing were not necessary after talking separately with both the freshman student and the Sigma Pi president. The other reports contain vague information that does not reasonably suggest that Sigma Pi was hazing.

{¶68} It is not disputed that OU staff suspected fraternity members of hosting or participating in off-campus parties and likely providing alcohol to the underage members of Sigma Pi, but there is no evidence that any such suspicions were based on actionable reports for which Defendant could initiate an official investigation or otherwise impose formal sanctions against individual members of Sigma Pi or the entire student organization for hazing. Moreover, the Court cannot reasonably conclude that any suspected misconduct proves as a matter of law that hazing was foreseeable. *See, e.g., Shivers* at ¶ 15 (The court concluded that the university knowing that "unauthorized

persons could gain access to Daniels Hall" and that "the co-ed dormitory gave males open access to female floors" was "insufficient to prove it reasonably foreseeable that men not authorized to be in Daniels Hall would commit violent crimes against women in that hall.").

{¶69} To compare with hazing, the totality of the circumstances must involve some level of coercion or compulsion where the initiate or member would believe that his potential or continued membership would be compromised if he did not participate. *See* R.C. 2903.31 (Ohio's statutory definition for hazing is "doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization or any act to continue or reinstate membership in or affiliation with that causes or creates a substantial risk of causing mental or physical harm to any person, including coercing another to consume alcohol or a drug of abuse."). No such verifiable allegations were present in the few complaints that Defendant received involving Sigma Pi following 2014. Therefore, on this record, there is insufficient evidence to conclude that Defendant should have known that Sigma Pi's hazing in 2014 was not an isolated issue or that the imposed sanctions did not effectively address the misconduct. Given the limited number of prior reports and the spatial separation between them as well as the discrete nature of the allegations and variation in the type of misconduct reported, the Court finds that the prior complaints involving Sigma Pi do not prove it reasonably foreseeable that Collin or any other initiate would be hazed in 2018. *See, e.g., Shivers* at ¶ 14 ("Because the burglary and theft offenses were all non-violent crimes committed against property, and the infrequent assaults are dissimilar to plaintiff's rape, they are insufficient as a matter of law to prove defendant knew or should have known that the rape was likely to occur in Daniels Hall.").

{¶70} Instead, the prior reports of misconduct of which Defendant was aware were not so specific as to suggest that hazing was likely occurring in Fall 2018 or that a student's death would occur. *See, e.g., Shivers* at ¶ 11 (crime statistic records that do not contain information about the nature of the crimes were insufficient to establish as a matter of law that a rape which occurred in an on-campus dormitory was foreseeable). The record lacks sufficient evidence to reasonably conclude as a matter of law that Defendant knew or should have known that Collin would be hazed in 2018. *See id.* at ¶ 10 (finding that a university's effort to warn its students of common risks and providing

instructions about staying safe on campus is insufficient as a matter of law to conclude that the university reasonably anticipated an injury was likely to occur). Therefore, the Court finds that Defendant met its burden pursuant to Civ.R. 56(C) to show that Collin's death was not foreseeable and Plaintiffs' failed to meet their reciprocal burden under Civ.R. 56(E).

{¶71} Furthermore, even if Plaintiffs refuted with sufficient evidence that Defendant owed a duty to warn or protect Collin from hazing, the Court finds that Defendant acted in accordance with any required standard of care under the circumstances. *Kroll v. Close*, 82 Ohio St. 190, 30 (1910) (when determining reasonableness "where the facts are clear and undisputed, it is to be regarded as a purely a question of law."). Within two months of his death, the undisputed evidence shows that Defendant warned Collin of the dangers of hazing by educating him about OU's formal anti-hazing policy as well as requiring him to attend anti-hazing presentations and providing resources to report hazing or otherwise seek help. While Plaintiffs argue that the standard of care required Defendant to employ stricter punishments in response to the reports of Sigma Pi's hazing in 2014, the undisputed evidence shows that Defendant disciplined Sigma Pi in accordance with its policies and procedures. Furthermore, the record also shows that Defendant investigates and initiates the conduct process whenever it receives a reliable report of misconduct. Even if the benefit of hindsight suggests that Defendant could have punished Sigma Pi more severely in 2014, it is not the Court's place to second guess Defendant's management of internal disciplinary matters. *See generally Worth v. Huntington Bancshares*, 43 Ohio St.3d 192, 197 (1989).

{¶72} Without an actionable report or otherwise reliable information of hazing involving Sigma Pi in Fall 2018, the Court finds that the standard of care under the circumstances require Defendant to warn Collin by educating him about hazing and making him aware of its policies against hazing. *See generally Huston* at 217 ("a defendant must exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances."); *see generally Shivers* at ¶ 10 ("if defendant failed to warn its students of the dangers of living in an open, urban environment, defendant potentially would expose itself to other lawsuits for breaching its duty to warn the students of the general potential danger of which it had knowledge.").

Under the circumstances, Defendant's policy against hazing, as detailed in OU's formal anti-hazing policy and the SCC, and the available educational resources regarding hazing served to reasonably warn its students, including Collin, of OU's prohibition against hazing and various other forms of misconduct as well as reasonably provided students with the information necessary for them to report or protect themselves from hazing.

{¶73} While Plaintiffs' failing to establish a duty is sufficient to render summary judgment, the Court also finds that Defendant is entitled to judgment as a matter of law regarding breach. Because reasonable minds could come to but one conclusion that Plaintiffs can neither establish that Defendant owed a duty nor breached any arguable duty, it is not necessary for the Court to consider Defendant's defense about whether Collin assumed the risks of his injuries. Therefore, Defendant is entitled to judgment as a matter of law on Plaintiffs' negligence claim.[7]

Second Claim: Ohio's Civil Hazing Statute—R.C. 2307.44

{¶74} At the outset, the Court acknowledges that this claim involves questions of law regarding statutory construction that have not been previously addressed by the courts. Nevertheless, the Court of Claims has subject-matter jurisdiction to determine actions under R.C. 2307.44 brought against a state university pursuant to R.C. 2743, et seq. when the allegation of hazing involves students in a state university and state university employees entitled to civil immunity under R.C. 9.86. *See* R.C. 2307.44; *see, e.g., Cameron v. Univ. of Toledo*, 2014-Ohio-5587, ¶ 5-16 (6th Dist.).

{¶75} Pursuant to R.C. 2307.44, "[a]ny person who is subjected to hazing[8] . . . may commence a civil action for injury or damages, including mental and physical pain and suffering, that resulted from the hazing." In addition to those participating in the hazing, a university may be liable for the injuries sustained during hazing incidents involving its

[7] After the necessary analysis and in accordance with both parties' explicit requests, Plaintiffs' negligence claim may now be dismissed with prejudice.

[8] "[D]oing any act or coercing another, including the victim, to do any act of initiation into any student . . . organization . . . that causes or creates a substantial risk of causing mental or physical harm to any person, including coercing another to consume alcohol or a drug of abuse." R.C. 2903.31.

students and its employees who either "knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it . . . ." R.C. 2307.44.

{¶76} However, a university may avoid liability in a civil hazing action through active enforcement of an anti-hazing policy. *Cameron v. Univ. of Toledo*, 2018-Ohio-979, ¶ 18-32 (10th Dist.), quoting R.C. 2307.44. R.C. 2307.44 specifically states: "In an action against a school, university, college or other educational institution, it is an affirmative defense that the school, university, college, or other institution was actively enforcing a policy against hazing at the time the cause of action arose."

{¶77} The Court notes that there is a general void of binding case law involving Ohio's hazing statute. However, it is generally accepted that a

> statute must be read and construed in the light of the common law then in force at the time of its enactment, and the legislature will not be presumed or held to have intended a repeal or modification of a well settled rule of the common law then in force, unless the language employed by it clearly imports such intention.

State ex rel. Morris v. Sullivan, 81 Ohio St. 79, 95-96 (1909). Two things are clear from a plain reading of R.C. 2307.44 with regard to claims against a university and its employees: (1) the legislature embraced traditional negligence standards concerning the foreseeability of the hazing—i.e., "knew or reasonably should have known"—and the scope of a university employee's duty to a student in the event the hazing was foreseeable—i.e., "to take reasonable steps to prevent the hazing"— and (2) the legislature clearly imported an intention to create an affirmative defense against liability for universities that prohibit hazing and to remove defenses against liability based on a hazing victim's contributory negligence, consent, or assumption of the risk.

{¶78} In moving for summary judgment, Defendant first argues that it is entitled to judgment as a matter of law because it was actively enforcing an anti-hazing policy in Fall 2018, including at the time of Collin's death. Notwithstanding the affirmative defense, Defendant additionally argues that Plaintiff cannot show that any OU employee knew or reasonably should have known that Collin was being hazed or that Collin was subjected to hazing at the time of his death. While the parties agree that Defendant had prohibitions against hazing in its SCC and OU's formal anti-hazing policy in effect during Fall 2018,

Plaintiffs dispute that Defendant was actively enforcing it prior to Collin's death. Specifically, Plaintiffs contend that Defendant cannot establish the statutory affirmative defense because active enforcement of an anti-hazing policy required Defendant to more rigorously address reports of hazing involving Sigma Pi in the years before Collin's death. Similarly, Plaintiffs argue that Defendant's employees reasonably should have known that Sigma Pi was hazing Collin because their failure to appropriately address prior reports of hazing involving Sigma Pi allowed the fraternity's culture of hazing to persist into Fall 2018.

{¶79} While Defendant argues that Collin was not "subjected to hazing" on the night of his death, the Court declines to address this argument. *See State ex rel. McCarley v. Dept. of Rehab. & Corr.*, 2024-Ohio-2747, ¶ 10 (The Supreme Court held that there is no obligation to address every alternative argument presented in a motion because a court is not required to consider any legal theory beyond that which adequately disposes of the case). Although neither the parties nor the evidence points the Court to the exact date when Collin was first subjected to hazing, the parties do not dispute that Collin was hazed at some point during Fall 2018. Accordingly, the Court assumes without deciding that Collin was "subjected to hazing" during Fall 2018.

{¶80} Instead, the Court will first address whether Defendant is entitled to the affirmative defense. In determining the applicability of the affirmative defense, the Court must define the legal terms "actively enforcing" and "at the time the cause of action arose." Determining the meaning of a phrase contained in a statute is a matter of statutory construction that poses a question of law where the "court's duty is to give effect to the words used in a statute, not to delete or insert words" that are not used. *Schmitt v. Schmitt*, 2022-Ohio-1685, ¶ 10 (10th Dist.). If a statute "conveys a clear and definite meaning", then a court lacks the authority "to dig deeper than the plain meaning of an unambiguous statute." If a court cannot make "an initial finding" that "a statutory provision is 'capable of bearing more than one meaning'", then the court must apply the plain language of the unambiguous statute. *See Jacobson v. Kaforey*, 2016-Ohio-8434, ¶ 8, quoting *Dunbar v. State*, 2013-Ohio-2163, ¶ 16.

{¶81} The Court disagrees with Plaintiffs' contention that it would have to resolve genuine issues of material fact to determine whether Defendant violated R.C. 2307.44.

Rather, the Court finds that Ohio's civil hazing statute is unambiguous and there is no reason to look past the common meaning of the words used and apply the plain language as written. Because a portion of Plaintiffs' opposition concerns Defendant's enforcement of its policies prior to Fall 2018, the Court will first address *when* R.C. 2307.44 requires Defendant to have been enforcing, actively or otherwise, an anti-hazing policy.

{¶82} Upon review, R.C. 2307.44 explicitly states that it is an affirmative defense if Defendant is "actively enforcing" an anti-hazing policy "at the time the cause of action arose." The statute also plainly conveys that Collin's cause of action arose when he was "subjected to hazing" that resulted in injury or damages. Therefore, the Court finds that R.C. 2307.44 unambiguously requires Defendant to be "actively enforcing" an anti-hazing policy at the time that Collin was "subjected to hazing" in order to establish its affirmative defense. Collin could not have been "subjected to hazing" for any cause of action to arise until Fall 2018 because he had to be a student at OU voluntarily seeking affiliation with Sigma Pi. *See generally Duitch v. Canton City Schools*, 2004-Ohio-2173, ¶ 24 (5th Dist.) (the court distinguished bullying from hazing and found that R.C. 2307.44 requires circumstances where "the victim has, through his or her actions or otherwise, consented to the hazing" or "where initiates willingly subject themselves to acts in order to be accepted into a social group or other group whose membership is voluntary."); *see also Cameron v. Univ. of Toledo*, 2016-Ohio-8142, ¶ 33 (Ct. of Cl.) ("Initiation is commonly defined as: 'The rites, ceremonies, or instructions with which one is made a member of a sect, or society . . . .'").

{¶83} Giving effect to the statute's plain language, the Court finds that Defendant is entitled to the statutory affirmative defense if the evidence establishes it was "actively enforcing" an anti-hazing policy in Fall 2018. Importantly, the parties do not dispute that Defendant adopted a stand-alone, formal anti-hazing policy in February 2017—which was in effect during Fall 2018, including at the time of Collin's death—and Plaintiffs do not take issue with the ways in which Defendant enforced its anti-hazing policy against Sigma Pi following Collin's death.

{¶84} Now that the Court has established *when* the statute requires Defendant to have been actively enforcing such a policy and that the parties agree Defendant had a policy, the Court will examine *what* the statute requires for active enforcement. While

both parties presented competing expert opinions on this particular issue, this Court is not required to "abdicate its duty to interpret the law to anyone, including an expert witness." *See, e.g., Johnson v. Adbullah*, 2021-Ohio-3304, ¶ 6-7 (The Ohio Supreme Court explained that courts are not required to accept an expert's opinion as to whether the evidence satisfies the definition of a legal term). Indeed, this Court is fully capable of determining if sufficient evidence exists to conclude whether reasonable minds could come to different conclusions whether Defendant was "actively enforcing" the anti-hazing policy it had in place at the time Plaintiffs' cause of action arose. *See, e.g., id.* (The Supreme Court explained that, when possible, courts should independently determine whether the facts satisfy the definition of a statutory legal term).

{¶85} Inasmuch as the legislature did not define what "actively enforcing" requires, the Court turns to the words themselves and gives them their common, ordinary meaning. *See* R.C. 1.42. Under Ohio law, the common meaning of "active" is "'characterized by action rather than by contemplation or speculation * * * productive of action or movement * * * engaged in an action or activity.'" *Jackson v. Metro. Life Ins. Co.*, 34 Ohio St.2d 138, 140-141 (1973), quoting Webster's Third New International Dictionary; *see also Fahlbush v. Crum-Jones, 2008-Ohio-1953,* ¶ 18 (1st Dist.), quoting Merriam Webster's Online Dictionary (2008) ("Likewise, 'active' is defined as 'marked by present operation' or 'engaged in action or activity.'"); *see also State v. Smith*, 2017-Ohio-776, ¶ 38, quoting Webster's New World College Dictionary 14 (4th Ed.2008) (7th Dist.) ("The common and ordinary meaning of 'active' is 'actual, not just nominal.'"). As an adverb, the meaning of "actively" is "in a manner involving great or constant activity."[9] Literally defined, both the transitive verb to "enforce" and its present participle "enforcing" mean "to carry out effectively."[10] Furthermore, a university has been found to be "actively enforcing" an anti-hazing policy when the university took steps to inform the students of its policy against hazing by once annually distributing the student handbook at the beginning of the school year, distributing informational documents to students specifically about hazing and when

[9] Merriam-Webster Online, *https://www.merriam-webster.com/thesaurus/actively.*

[10] Merriam-Webster Online, *https://www.merriam-webster.com/dictionary/enforcing*; Merriam-Webster Online*, https://www.merriam-webster.com/thesaurus/enforcing.*

university staff investigated claims of hazing. *Cameron v. Univ. of Toledo*, 2018-Ohio-979, ¶ 18-32 (10th Dist.).

{¶86} After viewing the evidence in a light most favorable to Plaintiffs, the Court finds that Defendant was "actively enforcing" a policy against hazing at the time Plaintiffs' cause of action arose. Initially, the parties agree that the record is void of any reports of hazing involving Sigma Pi in Fall 2018 prior to Collin's death. Despite Plaintiffs' contention that it should have been apparent to Defendant that a hazing culture existed within Sigma Pi, the Court finds that the record is similarly void of any evidence upon which the Court could reasonably conclude that Defendant had reason under its policy to investigate or otherwise discipline Sigma Pi for hazing its pledges in Fall 2018 prior to Collin's death.

{¶87} Under the circumstances, reasonable minds would find that Defendant was "actively enforcing" its anti-hazing policy by informing students about its policy against hazing, providing information about the dangers of hazing, and offering access to resources for students to report hazing or protect themselves from hazing. The undisputed evidence demonstrates that Defendant not only employed these measures with respect to the entire student body, but it specifically required fraternity and sorority student leaders to attend specialized workshops about hazing and required all students wanting to join Greek Life to attend anti-hazing presentations before becoming official members.

{¶88} Plaintiffs do not dispute that Wahib, the student president of Sigma Pi in Fall 2018, attended the anti-hazing workshop in March 2018. Furthermore, OU required prospective Greek Life members to attend two educational programs about hazing in order to pledge any fraternity at OU, both of which Collin attended in September 2018. Moreover, the evidence shows that university staff review all complaints of hazing, make efforts to determine the veracity of the allegations, and initiate a disciplinary process if actionable information is discovered. Therefore, the Court finds that reasonable minds could come to but one conclusion that Defendant established the affirmative defense.

{¶89} Notwithstanding this finding, the Court will also determine whether any university employee "knew or reasonably should have known" about "the hazing" and, if so, whether the employee(s) took "reasonable steps to prevent it . . . ." The Court reiterates that this language is indicative of traditional negligence standards regarding

duty. Accordingly, the Court further reiterates that the existence and scope of duty are generally questions of law. *See Shivers* at ¶ 6.

{¶90} After applying the unambiguous statutory language to the undisputed facts, the Court finds that there is insufficient evidence to reasonably conclude that any OU employee had knowledge, whether actual or constructive, that members of Sigma Pi were hazing or that any OU employee would have tolerated such misconduct had an actionable report been made. Importantly, it is undisputed that various individuals close to Collin knew that he was being hazed and did not report it to any OU employee or law enforcement. Because the parties agree that the university lacked actual notice of any hazing in Fall 2018, the only question remaining is whether Defendant had constructive notice.

{¶91} To this, Plaintiffs emphasize that Defendant's employees should have known that Sigma Pi was more likely than not subjecting Collin to hazing in 2018 because they failed to appropriately address previous reports of hazing involving Sigma Pi which allowed a culture of hazing to persist within the fraternity. To find that reasonable minds could come to different conclusions regarding Defendant's knowledge of Sigma Pi's Hazing in 2018, Plaintiffs' position requires the Court to establish a relationship between punishment and deterrence, retroactively substitute its own business judgment for that of OU staff regarding conduct decisions made years in advance of Collin's death, and attribute constructive knowledge to Defendant merely because the selected punishment did not deter Sigma Pi from hazing in 2018 in violation of OU's policies. Under the circumstances, the Court finds that this conclusion would be an unreasonable application of Ohio's hazing statute.

{¶92} The statute specifically imposes liability on "any administrator, employee, or faculty member of the school, university, college or other educational institution who knew or reasonably should have known of the hazing *and* who did not make reasonable attempts to prevent it." (Emphasis added) R.C. 2307.44. Upon a plain reading of the statute, the Court finds that the statutory duty to make reasonable attempts to prevent the hazing is only imposed *after* the determination that such hazing was foreseeable.

{¶93} Defendant contends that the statute requires OU's employees to have knowledge "of the particular hazing at issue in this case, not just generalized hazing or

hazing that had occurred in the past." Conversely, Plaintiffs argue that OU's employees "had every reason to know that Sigma Pi was beset by a culture of hazing because, throughout the years proceeding Collin's death, OU received repeated reports of hazing at Sigma Pi." Upon review, the Court finds both positions lack merit.

{¶94} While merely possessing general knowledge of an organization's potential to haze or its prior isolated instances of hazing is not sufficient evidence to attribute constructive knowledge of hazing to university staff as a matter of law, there may still exist a set of circumstances where knowledge could be implied if any university employee was aware of facts that would reasonably induce an inquiry that could lead to discovering an organization's pervasive and ongoing culture of hazing but no such reasonable inquiries were made. Stated another way, the Court does not find the phrase "the hazing" to be ambiguous such that a discussion of whether the legislature intended the statute to be construed as narrowly as Defendant contends or as broadly as Plaintiffs contend. Instead, the Court finds that the phrase is unambiguous when read within the context of the whole statute, which clearly conveys that any university employee will incur a statutory duty if he or she has (1) actual or constructive notice that, (2) at the time that the cause of action arose, (3) students of the accused organization (4) were either (a) participating in or (b) coercing other students to participate in (5)(a) any act of initiation into the organization or (b) any act to continue or reinstate membership in or affiliation with the organization. Such employees with this requisite knowledge must "make reasonable attempts to prevent" the hazing or they expose themselves to liability under R.C. 2307.44.

{¶95} Applying the statute to the facts of this case, Plaintiffs have a reciprocal burden on summary judgment to submit sufficient evidence for this Court to find that reasonable minds could come to different conclusions whether one or more employee of OU (1) knew or reasonably should have known that, (2) in Fall 2018, (3) members of Sigma Pi (4) were hazing OU students (5) who were pursuing membership in or continued affiliation with Sigma Pi; and, subsequently, that (6) such OU employee(s) with the requisite knowledge did not make reasonable attempts to prevent the hazing. After viewing the evidence in a light most favorable to Plaintiffs, the Court finds that the record lacks sufficient evidence to reasonably conclude that any member of OU's staff knew or reasonably should have known that members of Sigma Pi were hazing in Fall 2018.

{¶96} For the same reasons that Sigma Pi's hazing was not foreseeable for purposes of imposing a common law duty in negligence, the Court similarly finds that there is insufficient evidence to reasonably conclude that any employee of OU possessed the knowledge necessary to incur the statutory duty prescribed by R.C. 2307.44. *See Mann v. Northgate Investments*, 2014-Ohio-455, ¶ 17 ("statutes are presumed to embrace the common law extant at their enactment."). Even considering the reports made prior to Fall 2018, the Court cannot reasonably conclude that any OU employee would reasonably suspect Sigma Pi of hazing in Fall 2018 given the significant time between the reports, the anonymous and vague nature of many of the reports, and the elusive nature of the various reporters' identities or inconsistency across the accounts reported. Furthermore, the Court cannot reasonably conclude based solely on Sigma Pi's history that OU's employees would not have taken reasonable steps to prevent Sigma Pi from hazing its initiates in Fall 2018 had they been made aware of the hazing prior to Collin's death. Therefore, the Court finds that Defendant met its burden pursuant to Civ.R. 56(C) and Plaintiff failed to meet its reciprocal burden pursuant to Civ.R. 56(E). As a result, Defendant is entitled to judgment as a matter of law on this claim.

CONCLUSION

{¶97} Having reviewed all the evidence in a light most favorable to Plaintiffs and for the reasons stated above, the Court finds that Defendant is entitled to judgment as a matter of law pursuant to Civ.R. 56.

LISA L. SADLER
Judge

[Cite as *Wiant v. Ohio Univ.*, 2024-Ohio-4571.]

WADE WIANT, Admr., et al. Plaintiffs v. OHIO UNIVERSITY Defendant	Case No. 2021-00362JD Judge Lisa L. Sadler JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶98} For the reasons set forth in the decision filed concurrently herewith, the Court (1) DENIES Defendant's May 21, 2024 motion, (2) GRANTS Defendant's July 18, 2024 motion, (3) STRIKES Plaintiffs' July 17, 2024 notice, (4) GRANTS Plaintiffs' July 23, 2024 motion for partial withdrawal and, finally, (5) GRANTS Defendant's motion for summary judgment.

{¶99} As a result, the Court renders judgment in favor of Defendant. All previously scheduled events are VACATED. All other pending motions not resolved by this decision are DENIED as moot. Court costs are assessed against Plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed August 1, 2024
Sent to S.C. Reporter 9/19/24