Docket No. 120967 (Consolidated with Docket Nos. 120951 & 120986)

IN THE ILLINOIS SUPREME COURT

GARY I. BOGENBERGER, as special administrator of the Estate of David Bogenberger, deceased, Plaintiff-Appellee, v. PI KAPPA ALPHA CORPORATION, INC., a corporation; PI KAPPA ALPHA INTERNATIONAL FRATERNITY, an unincorporated association; ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS, an unincorporated association; ALYSSA ALLEGRETTI; JESSICA ANDERS; KELLY BURBACK: CHRISTINA CARRISA; RAQUEL CHAVEZ; LINDSEY FRANK; DANIELLE GLENNON: KRISTINA KUNZ; JANET LUNA; NICHOLE MINNICK; COURTNEY ODENTHAL; LOGAN REDFIELD; KATIE REPORTO; TIFFANY SCHEINFURTH; ADRIANNA SOTELO; PRUDENCE WILLRET; KARISSA AZARELA; MEGAN LEDONE; NICHOLE MANFREDINI; JILLIAN MERRILL; MONICA SKOWRON; and PIKE ALUM, LLC., Defendants, and ALEXANDER M. JANDICK, individually and as an officer of ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS UNIVERSITY; JAMES P. HARVEY, individually and as officer of PI KAPPA ALPHA ETA NU CHAPTER; OMAR SALAMEH, individually and as an officer of PI KAPPA ALPHA ETA NU CHAPTER; PATRICK W. MERRILL, individually and as an officer of ETA NU CHAPTER OF PI KAPPA ALPHA FRATERNITY AT NORTHERN ILLINOIS UNIVERSITY; STEVEN A. LIBERT, individually and as an officer of PI KAPPA	On Appeal From The Illinois Appellate Court, First Judicial District, First Division, Docket No. 1-15-0128 There Heard On Appeal from The Circuit Court Of Cook County, Illinois County Department, Law Division No. 2013 L 1616 The Honorable Kathy M. Flanagan, Judge Presiding FILED FEB 22 2017 SUPREME COURT CLERK

ALPHA ETA NU chapter; JOHN HUTCHINSON, individually and as an officer of PI KAPPA ALPHA ETA NU chapter; DANIEL BIAGINI, individually and as an officer of PI KAPPA ALPHA ETA NU chapter; MICHAEL J. PHILLIP, Jr.; THOMAS F. COSTELLO; DAVID R. SAILER; ALEXANDER D. RENN; ESTEFAN A. DIAZ; HAZEL A. VERGARALOPE; MICHAEL D. PFEST; ANDRES J. JIMENEZ, JR.; ISAIAH LOTT; ANDREW W. BOULEANU; NICHOLAS A. SUTOR; NELSON A. IRIZARRY; JOHNNY P. WALLACE; DANIEL S. POST; NSENZI K. SALAS1NI; RUSSELL P. COYNER; GREGORY PETRYKA; and KEVIN ROSSETTI, Defendants-Appellants.	

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ARGUMENT

I. THE APPELLATE COURT ERRED IN RECOGNIZING A COMMON LAW CAUSE OF ACTION IMPOSING ALCOHOL-RELATED LIABILITY CONTRARY TO THIS COURT'S REPEATED PRONOUNCEMENTS THAT THE LEGISLATURE HAS PREEMPTED THE ENTIRE FIELD

A. The Plaintiff Alleged Alcohol-Related Liability In Counts V-VIII Of The Fifth Amended Complaint That Was Essential To His Claim But Legislatively Preempted

The plaintiff agrees with the defendants that Illinois does not recognize any form of "social host" liability (Br., at 15-16). If counts V-VIII of the fifth amended complaint against the fraternity members and officers sound in "social host" liability, the plaintiff has pled himself out of court.

To avoid dismissal, the plaintiff disputes that these counts impose "social host" liability on the fraternity members and officers. Like the appellate court, the plaintiff makes no attempt to define "social host" or, for that matter, "alcohol-related" liability, but asserts that whatever this court means by these different liabilities, counts V-VIII are premised instead on "recognized common law principles of negligence" (Br., at 16). The plaintiff's argument begs the ultimate question of whether a common law action for supplying alcohol to a person 18 years of age or older survives this court's decisions in *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003) and *Charles v. Seigfried*, 165 Ill. 2d 482 (1995).

In *Wakulich*, where this court rejected liability, this court referred to "adult social hosts" "as persons 18 years of age and older who knowingly serve alcohol to a minor." 223 Ill. 2d at 230. "Social host" liability describes exactly what the phrase says—that liability would be imposed on "social hosts" who knowingly serve alcohol to their guests. These words would seem to apply to the fraternity members and officers here, except, of

course, unlike the plaintiff in *Wakulich*, David Bogenberger was not a minor when he and others who were present drank excessive amounts of vodka during a pledge event on the local fraternity chapter's premises. As a 19 year old, Bogenberger was not in the class of persons for whose protection the General Assembly has enacted laws imposing "alcohol-related" liability on those persons 18 and older who willfully supply alcohol to minors.

Regardless of how "social host" liability is applied under this court's precedents, the plaintiff offers a false dichotomy between "alcohol-related" injury claims brought against "social hosts" and those "alcohol-related" claims that arise from hazing activities. The two types of claims are not mutually exclusive. Indeed, both types of claims fall within the "alcohol-related" liability which this court has declared is legislatively preempted. *See Charles*, 165 Ill. 2d at 496 (noting that "[l]egislative preemption in the field of alcohol related liability *extends* to social hosts who provide alcoholic beverages to another person" (emphasis added)). Legislative preemption is not limited to "social host" liability only. Here, legislative preemption bars a common law action against those persons who, like the individual defendants named in counts V-VIII, negligently served alcohol to guests who were 18 years of age and older.

The plaintiff never addresses key passages from this court's previous opinions which refer to "Illinois' long history of legislative preemption of *all* alcohol-related liability [which] makes it especially appropriate for us to defer to the legislature ***" (emphasis added) (*Charles*, 165 Ill. 2d at 496) and which note that "*[t]rough its passage and continual amendment of the Dramshop Act, the General Assembly has preempted the entire field of alcohol-related liability.*" *Wakulich*, 203 Ill. 2d at 231. This court was not simply referring to "social host" liability in these passages of the *Wakulich* and *Charles*

opinions, but rather to "all alcohol-related" liability and the "entire field" regardless of the particular circumstances. To date, the General Assembly has imposed "alcohol-related" liability on only three classes of defendants: (1) liquor vendors under the Liquor Control Act (235 ILCS 5/6-21 (West 2000)); (2) those persons at least 21 years of age who pay for a hotel or motel room knowing that the room will be used by underage persons for unlawful consumption of alcohol (235 ILCS 5/6-21(a) (West 2012)); and (3) those persons at least 18 years of age who under the Drug and Alcohol Impaired Minor Responsibility Act (740 ILCS 58/1 *et seq.* (West 2012)) willfully supply alcohol or illegal drugs to persons under the age of 18 who injure themselves or other persons. These statutes do not afford a basis for recovery by the plaintiff in this case.

Notably, the liability imposed by the legislature on those persons for the supplying of alcohol by gift or sale does not allow persons 18 years of age or older a cause of action for the injuries they sustain as a result of their own intoxication. This "alcohol-related" liability does not exist at common law as this court has held many times. *See, e.g.*, *Wakulich*, 203 Ill. 2d at 231 ("[T]he common law recognized no cause of action for injuries arising out of the sale or gift of alcoholic beverages"); *Charles*, 165 Ill. 2d at 490 ("[F]ew rules of law are as clear as that no liability for the sale or gift of alcoholic beverages exists in Illinois outside of the Dramshop Act"); *Cunningham v. Brown*, 22 Ill. 2d 23, 30-31 (1961) (barring recovery by estate of tavern patron injured by his own intoxication). This court's pronouncements are consistent and could not be clearer.

Most of the plaintiff's brief attempts to demonstrate that drinking as a form of hazing differs from social drinking ("David Bogenberger was not a guest at a social

party" (Br., at 20)). The plaintiff's efforts prove nothing about the viability of the claim. The common law would have certainly considered him to be a "guest" of the local fraternity chapter if he had been injured by a dangerous condition of the premises rather than by his overconsumption of alcohol. The issue, however, is not whether counts V-VIII of the fifth amended complaint impose "social host" liability as opposed to a liability cognizable under common law principles of negligence; rather, under this court's precedents, the issue is instead whether these counts impose "alcohol-related" liability. If they, in fact, do, the legislature has preempted "the entire field" without exception for alcohol consumed by pledges and others during hazing activities.

The plaintiff describes himself as the "master" of his own complaint for pleading purposes (Br., at 16), but all that means is that he gets to choose the theory on which to proceed if it is recognized at common law. The case cited by the plaintiff, *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 718 (4th Dist. 1998), does not stand for the proposition that the plaintiff can decide unilaterally what to call his theory under the facts alleged and whether the common law would permit recovery. A common law action based on a violation of the Hazing Act (720 ILCS 120/5 (West 2012)) is legislatively preempted where the liability is "alcohol-related" as was alleged in this case.

The fifth amended complaint is clearly and unequivocally predicated on David Bogenberger's overconsumption of vodka, which led to his intoxication, unconsciousness and death. The plaintiff alleged that his son's blood alcohol level reached .43 mg/dl (R.C3043). The fact that his death took place after a hazing event does not make the death any less "alcohol-related"—the excessive drinking was alleged to be a requirement for fraternity membership by the pledges (R.C3033-34) and he would not have died but

for the high level of alcohol in his blood. Under the facts pled, the defendants' liability was "alcohol-related" precisely because the excessive drinking was essential to his theory under *Haben v. Anderson*, 232 Ill. App. 3d 260 (3d Dist. 1992) and *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill. App. 3d 231 (4th Dist. 1987). Whether that "alcohol-related" liability should be allowed against individual fraternity members and officers who knowingly supplied him with the vodka was under this court's precedents a matter exclusively for the legislature to decide.

B. The Plaintiff Does Not Claim That The Hazing Act Creates An Implied Right Of Action And There Is No Reason To Rely On A Presumption Of Legislature Acquiescence In The Recognition Of A Common Law Action

The plaintiff does not ask this court to hold that the Hazing Act creates an implied right of action ("This Court could find a private right of action but plaintiff does not require the court to go that far ***") (Br., at 35). Neither does the amicus (Br., at 2). Therefore, whether the Hazing Act creates an implied private right of action as opposed to a common law action when drinking is alleged to be a requirement for membership is not before the court. Not having asked this court to find a private right of action under the Hazing Act, the plaintiff has forfeited the argument. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23. Accordingly, the plaintiff is foreclosed from looking to the Hazing Act as impliedly creating a private right of action in this case.

This does not stop the plaintiff from arguing (Br., at 24-25) that the legislative history behind the Hazing Act supports the recognition of a common law right of action for damages based on the serving of alcohol to a person 18 years of age and older. The plaintiff does not point to a single statement made during the floor debates in 1995 that supports his argument that the legislature has acquiesced in the recognition of a common

law action in the circumstances of this case in addition to the criminal punishment, fines and restitution set forth in the Hazing Act. As the floor debates do not support his argument, he must rely on a presumption that the legislature has acquiesced for more than twenty years in the recognition of a common law action in *Haben* and *Quinn*. The plaintiff's reliance on the presumption is misplaced.

The defendants agree with the plaintiff that the legislature has treated hazing as distinct from social drinking, but it does not follow that the legislature acquiesced in the recognition of a common law action when it amended the Hazing Act in 1995. The legislature may have decided that Illinois public policy is better served by treating hazing as a Class 4 felony punishable by imprisonment, fines and restitution than by allowing persons to recover damages for their own intoxication when serious bodily harm or death results. The floor debates do not refer to *Haben* or *Quinn*, much less include any discussion of possible tort liability or civil damages against college students who take part in hazing activity. Silence is not implied approval.

Finding nothing in the 1995 floor debates that supports his argument, the plaintiff relies on the "more critical legislative history in 2013" (Br., at 25)—which the plaintiff fails to acknowledge was *after* the occurrence at issue here took place in 2012. The defendants did not overlook the most recent amendment to the Hazing Act. The amendment, effective August 6, 2013 (720 ILCS 5/12C-50.1 (West 2013)), has nothing to do with how this case should be decided. The General Assembly's intent in 1995 cannot be inferred from the 2013 amendment. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation"); *Warren v. Borger*, 184 Ill. App. 3d 38, 44

(5th Dist. 1989) (observing "statements of individual legislators made, as here, years after the legislation was passed, reflect only the viewpoints of those individuals and not necessarily the intent of the legislature as a whole when the bill was debated and passed"). The 2013 amendment made a failure to report hazing a misdemeanor, but the amendment still fails to provide for a cause of action or money damages.[1]

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[1] The new section of the Hazing Act provides:

> § 12C-50.1. Failure to report hazing.
>
> (a) For purposes of this Section, "school official" includes any and all paid school administrators, teachers, counselors, support staff, and coaches and any and all volunteer coaches employed by a school, college, university, or other educational institution of this State.
>
> (b) A school official commits failure to report hazing when:
>
> (1) while fulfilling his or her official responsibilities as a school official, he or she personally observes an act which is not sanctioned or authorized by that educational institution;
>
> (2) the act results in bodily harm to any person; and
>
> (3) the school official knowingly fails to report the act to supervising educational authorities or, in the event of death or great bodily harm, to law enforcement.
>
> (c) Sentence. Failure to report hazing is a Class B misdemeanor. If the act which the person failed to report resulted in death or great bodily harm, the offense is a Class A misdemeanor.
>
> (d) It is an affirmative defense to a charge of failure to report hazing under this Section that the person who personally observed the act had a reasonable apprehension that timely action to stop the act would result in the imminent infliction of death, great bodily harm, permanent disfigurement, or permanent disability to that person or another in retaliation for reporting.
>
> (e) Nothing in this Section shall be construed to allow prosecution of a person who personally observes the act of hazing and assists with an investigation and any subsequent prosecution of the offender.

The particular hazing and civil lawsuit to which the plaintiff refers (Br., at 25) did not arise from the overconsumption of alcohol. According to the newspaper article, the hazing reportedly took the form of physical assaults by members of the high school boys soccer team on school property—conduct that has always been actionable at common law. The high school student perpetrators were charged as juveniles with criminal battery and hazing. The settlement was paid on behalf of the high school, the school district and the school officials who were named as defendants in the civil lawsuit.

The plaintiff asserts that allowing a common law recovery when the hazing does not involve alcohol but barring a common law recovery when alcohol is involved means that the latter would be somehow "tolerated" under the law (Br., at 27). Given that all forms of hazing are subject to criminal prosecution, fines and restitution, this assertion is questionable at best, but the plaintiff misses the larger point. This court has long deferred to the General Assembly and its acknowledged competence in determining Illinois public policy in the "entire field of alcohol-related liability"—without exception. For well over a century, the General Assembly has regulated the sale and gift of liquor in Illinois. It has created a limited and exclusive form of strict civil liability, which it has characterized as *sui generis* (*Hopkins v. Powers*, 113 Ill. 2d 206, 211 (1986)), on profiting liquor vendors, and it has further imposed liability on those adults who have paid for motel or hotel rooms arranged for purposes of facilitating underage drinking. In each instance, the statutory liability extends only to third-parties—rather than to intoxicated persons. By separate legislation, the General Assembly has also acted to protect minors who are injured by their own intoxication, but it has otherwise stopped short of creating civil remedies in favor of those persons 18 years of age and older. Whether it would be good

public policy to fashion a civil remedy for those injured by their own intoxication in addition to criminalizing the drinking that takes the form of hazing is a decision for the legislature to make.

The plaintiff is wrong in asserting that the defendants do not want the court to consider the legislative history behind the Hazing Act (Br., at 23). What the defendants dispute is the plaintiff's reliance on a presumption of legislative acquiescence that is pure fiction. For over 20 years, going back to the 1995 amendments to the Hazing Act, the legislature had no reason to address the common law action recognized in favor of the intoxicated person in *Haben* and *Quinn* on the reasonable assumption that these appellate decisions did not survive this court's decisions in *Wakulich* and *Charles*. There would have been no need for the General Assembly to amend the Act to exclude expressly what was preempted in the first place. *Haben* and *Quinn* were not authoritative when they were decided and no decision from this court has addressed the issue in the interim. Where, as here, the meaning of a statute is unambiguous, little weight should be given to the fact that the legislature did not amend the statute after appellate opinions interpreting it. *Blount v. Stroud*, 232 Ill. 2d 302, 325 (2009).

Moreover, the appellate panels in *Haben* and *Quinn* were not interpreting the text of an earlier version of the Hazing Act. Instead, the panels relied on the alleged violation of the Act to support a common law action without further consideration of whether recovery created "alcohol-related" liability that was legislatively preempted. *Haben*, 232 Ill. App. 3d at 265; *Quinn*, 155 Ill. App. 3d at 238. Where, as here, a prior judicial interpretation is "untethered" from the language of the statute, it cannot be presumed that the legislature amended the statute with knowledge of an existing judge-made rule. *In re*

Marriage of Mathis, 2012 IL 113496, ¶¶ 91-91 (Garman, J.) (dissenting opinion). The legislature's failure to include in the 1995 amendment language addressing *Haben* and *Quinn* is too "weak a reed" on which to base an inference of legislative acquiescence. *People v. Marker*, 233 Ill. 2d 158, 175 (2009) (legislative acquiescence is a "weak reed on which to base a determination of the drafters' intent"). It is far more reasonable to conclude from its silence that the General Assembly simply never considered the issue. The appellate court here did not rely on a presumption of judicial acquiescence and neither should this court.

C. The Plaintiff's Reliance On Out-Of-State Cases Is Misplaced Given Legislative Preemption Of "The Entire Field Of Alcohol-Related" Liability

The plaintiff cites several cases from other jurisdictions which have allowed a common law recovery (Br., at 30, 35-36). This court refused to consider out-of-state cases in *Charles*, 165 Ill. 2d at 496, and in *Wakulich*, 203 Ill. 2d at 231. This court's recognition of legislative preemption of the "entire field of alcohol-related liability" makes cases from other jurisdictions—with each having its own laws—inapposite in considering Illinois public policy. *Charles*, 165 Ill. 2d at 496 ("Illinois' long history of legislative preemption of all alcohol-related liability makes it especially appropriate for us to defer to the legislature once again"). As was true in *Charles* and *Wakulich*, this court should respectfully decline the plaintiff's invitation to recognize any common law liability that is not grounded in Illinois law.

D. The Legislature Is Better Equipped Than The Courts To Address Issues Of "Alcohol-Related" Liability Fairly And Comprehensively

The plaintiff argues that his common law negligence claim satisfies traditional

duty analysis (Br., at 32). The amicus offers "me too" support (Br., at 2). This argument put the cart before the horse. If the plaintiff's claim is based on "alcohol-related" liability as argued above (at 4), then legislative preemption obviates the need for any traditional duty analysis because no recovery is allowed without legislation that would create a cause of action in favor of persons injured by their own intoxication.

In arguing in favor of a common law recovery by the intoxicated person, the plaintiff and the amicus do not address how unlimited tort liability would fit into the statutory scheme that regulates the sale and gift of liquor. Presently, the liability of the profiting liquor vendor is strict and damages are capped under the Liquor Control Act, and the liability extends only to third-parties. Yet, if the plaintiff prevails, persons not employed in the liquor business would be exposed to unlimited tort liability, a result that this court found "incomprehensible" in *Charles*, 165 Ill. 2d at 495.

In regard to "alcohol-related" liability, this court has stated that the "primary expression of Illinois public and social policy should emanate from the legislature." *Wakulich*, 203 Ill. 2d at 232 (quoting *Charles*, 165 Ill. 2d at 493). Further, as *Charles* noted in this connection:

> The General Assembly, by its very nature, has a superior ability to gather and synthesize data pertinent to the issue. It is free to solicit information and advice from the many public and private organizations that may be impacted. Moreover, it is the only entity with the power to weigh and properly balance the many competing societal, economic, and policy considerations involved.
>
> This court, on the other hand, is ill-equipped to fashion a law on this subject that would best serve the people of Illinois. We can consider only one case at a time and are constrained by the facts before us.
>
> * * * *
>
> The General Assembly is clearly the entity best able to resolve such issues

comprehensively.

Id. at 493-94. As the issue of "alcohol-related" liability is based on a delicate balancing of competing public policies, the legislature is better equipped than the courts to consider and address comprehensively whether and under what circumstances persons 18 years of age and older should be allowed to recover for injuries caused by their own intoxication. As illustrated by the post-*Wakulich* codification of a cause of action in the Drug and Alcohol Impaired Minor Responsibility Act, the legislature knows how to enact laws creating "alcohol-related" liability when it believes that public policy so requires. To recognize a common law action and allow recovery by those persons 18 years and older injured by their own intoxication in the circumstances of this case would infringe on the legislature's leading role in determining public policy in Illinois.

II. THE APPELLATE COURT UNDULY EXPANDED THE VOLUNTARY UNDERTAKING DOCTRINE BY APPLYING IT TO AS MANY AS TWENTY-SEVEN INDIVIDUAL FRATERNITY MEMBERS SUPPORTED ONLY BY BLANKET ALLEGATIONS THAT WERE BASED ON INFORMATION AND BELIEF

A voluntary undertaking to care for the decedent after he became unconscious required the plaintiff to plead specific affirmative acts of substantial performance by all twenty-seven individual defendants. *Bell v. Hutsell*, 2011 IL 110724, ¶ 26. Furthermore, "[a] voluntary undertaking requires some affirmative acknowledgment or recognition of the duty by the party who undertakes the duty." *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 36. The fifth amended complaint does not comply with this black letter law.

On appeal, the plaintiff refers to the individual defendants collectively as a unit ("[T]he allegations showed the members took complete control of the insensate pledges. As part of that control, they directed that no one seek help or call 911") (Br., at 41). The

plaintiff does not identify "the members" of the fraternity except for two of the defendants—the local chapter president and a fraternity member who allegedly positioned the decedent in bed so he would not aspirate (R.C3036-37). The fifth amended complaint does not allege facts showing that the members manifested any "acknowledgment or recognition" of the purported undertaking or what affirmative acts each of the twenty-seven members specifically performed as part of the joint undertaking.

The trial court did not force the plaintiff to plead in a vacuum. The plaintiff obtained through subpoenas thousands of pages of documents and far beyond what a litigant typically has access to before filing suit. The police reports included summaries of forty-three statements from twenty-five fraternity members, sixteen pledges and two of the women guests who attended the event (R.C3151).[2] The records produced also included video/audio interviews of active fraternity members and most of the defendants named in the litigation (R.C3164). Also, through discovery in a related case pending in the court of claims against Northern Illinois University, the plaintiff was able to obtain compact discs containing over 400 pages of additional documents and four CDs obtained from the University which include audio recordings of related student conduct hearings (R.C3160, R.C3164). Despite the many thousands of pages subpoenaed from law enforcement agencies and the university, the plaintiff's blanket conclusory allegations made on information and belief show that the plaintiff would impose liability for a voluntary undertaking jointly on any fraternity member or officer who attended the event at some point in the evening or who communicated with someone who did and who

[2] Two statements taken from fraternity officers are included in the appendix to the plaintiff-appellee's brief.

received the mass text message. *Wakulich*, on which the plaintiff relies, does not go that far.

In *Wakulich*, the mother of her 16 year old daughter's estate brought a wrongful death action and alleged that two defendants who were brothers, ages 21 and 18, along with their father, negligently performed a voluntary undertaking to care for her minor daughter after she became unconscious from drinking an entire bottle of alcohol at their house. 203 Ill. 2d at 227. In support of the voluntary undertaking theory, the plaintiff alleged that the brothers placed a pillow underneath her to prevent aspiration after she vomited, they refused to drive her home, they did not contact her parents, they did not seek medical attention, and they prevented other individuals in their home from calling 911 or seeking other medical intervention. *Id.* at 241. It was further alleged that the father ordered his sons to remove the unconscious 16 year old from their home the next morning, which they did, and that she died later the same day. *Id.* This court held that these allegations stated a cause of action for voluntary undertaking against each defendant because the defendants "effectively took complete and exclusive charge" of her care after she became unconscious. *Id.* at 243.

The superficial similarities between the two cases are more than outweighed by their differences. The *Wakulich* plaintiff's theory was directed at only two brothers, neither of whom was a minor, and their father, based on the affirmative acts by each defendant, as opposed to a collective failure to act. *Id.* at 246-47. The plaintiff made no claim of in-concert liability. In contrast to *Wakulich*, the plaintiff argues that the fraternity members and officers "acted in concert so that no specific identification of each individual was necessary because they were all liable as a group" (Br., at 39). Even

a theory of concert of action, however, requires more well-pleaded facts to support liability than what the plaintiff alleged was a voluntary undertaking by each of twenty-seven fraternity members and officers.

A person is liable for concert of action when two elements are met: (1) the actor knows that the other person's conduct is tortious; and (2) the actor "gives substantial assistance or encouragement" to that person to engage in tortious conduct. *See, e.g., Kohn v. Laidlaw Transit, Inc.*, 347 Ill. App. 3d 746, 758–59 (5th Dist. 2004), quoting Restatement (Second) of Torts § 876(b), at 315 (1979); *Sanke v. Bechina*, 216 Ill. App. 3d 962, 964 (2d Dist. 1991). The plaintiff did not identify anywhere in the fifth amended complaint what "substantial assistance or encouragement" each member allegedly gave to the other members and officers. Counts V-VIII did not use the words "assist" or "encouragement" to describe their acts or omissions. Similarly, "in order to state a claim for civil conspiracy, a plaintiff must plead a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23–24 (1998) (citing *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994)). On its face, the fifth amended complaint was deficient in pleading the "substantial assistance or encouragement" element as required by fact-pleading standards. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 509-10 (1988).

CONCLUSION

For all of the foregoing reasons, defendants-appellants respectfully request that this court reverse the opinion and judgment of the Illinois Appellate Court, First Judicial District, First Division, and affirm the trial court's memorandum opinion and order

dismissing plaintiff's action with prejudice.

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The word count of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) Points and Authorities, and the Rule 341(c) certificate of compliance, is 4,643 words.

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