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 Petition For Leave To 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

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. SALASINI; RUSSELL P. COYNER; GREGORY PETRYKA; and KEVIN ROSSETTI, Defendants-Appellants.	

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ORAL ARGUMENT REQUESTED

TABLE OF POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff, Gary L. Bogenberger, as special administrator of the estate of David R. Bogenberger, deceased, filed a twelve-count fifth amended complaint against 51 defendants as a result of his son's death following a fraternity pledge event known as "Mom's and Dad's Night" at the Eta Nu Chapter of the Pi Kappa Alpha fraternity house on the campus of Northern Illinois University. Defendants included the national fraternity organization, its local chapter, seven officers of the local chapter, twenty fraternity members, twenty-one nonmembers, and the landlord. Plaintiff alleged that David Bogenberger, a fraternity pledge, was served and drank excessive amounts of alcohol, became unconscious, was left on a bed by a fraternity member and later died. Counts I and II of the fifth amended complaint were directed at the defendants, Pi Kappa Alpha Corporation, Inc. and Pi Kappa International Fraternity, Inc.; counts III and IV were directed at Eta Nu Chapter of Pi Kappa Alpha International Fraternity at Northern Illinois University, Pi Kappa Alpha Corporation, Pi Kappa Alpha International Fraternity, and seven officers or pledge board members; counts V and VI were directed at seven officers and pledge board members individually; counts VII and VIII were directed at twenty members of the fraternity; counts IX and X were directed at twenty-one non-member women students who attended the fraternity event; and counts XI and XII were directed at Pike Alum, LLC, the owner of the premises where the fraternity was located. All claims were based on common law negligence and brought pursuant to the Wrongful Death Act (740 ILCS 180-1 *et seq.* (West 2012)) and the Survival Act (735 ILCS 5/27-6 (West 2012)).

The trial court granted defendants' section 2-615 motions to dismiss. The Illinois Appellate Court, First Judicial District, First Division (2016 IL App (1st) 15028), affirmed in part, reversed in part and remanded, holding, *inter alia*, that plaintiff stated a cause of action for common law negligence against the twenty fraternity members and seven fraternity officers based on conduct that allegedly violated the Hazing Act (720 ILCS 120/5 (West 2012) and that they also assumed a voluntary undertaking to care for unconscious pledges, including decedent.

The question raised is on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the trial court properly determined that the fifth amended complaint failed to state a common cause of action for negligence based on a violation of the criminal Hazing Act when a fraternity pledge died as a result of being served and drinking excessive amounts of alcohol during a fraternity-organized pledge event.

Whether the trial court properly determined that the fifth amended complaint failed to state a cause of action based on a voluntary undertaking to care for inebriated pledges, which was supported only by blanket allegations made on information and belief against as many as twenty-seven individual fraternity officer and member defendants.

STATEMENT OF JURISDICTION

Plaintiff appealed from the final order dismissing his action with prejudice pursuant to Illinois Supreme Court Rules 301 (Ill. S. Ct. R.301) (eff. Feb. 1, 1994) and 303 (Ill. S. Ct. R.303) (eff. June 4, 2008). The trial court entered its amended memorandum opinion and order on December 12, 2014, made *nunc pro tunc* to

December 11, 2014 (R.C3451-58). Plaintiff filed his notice of appeal within 30 days on January 9, 2015 (R.C4101-02). The appellate court issued its opinion and judgment on June 13, 2016. Defendants thereafter obtained an extension of time in which to file their Rule 315 petition for leave to appeal which they timely filed on July 29, 2016.

STATUTE INVOLVED

120/5. Hazing

(a) A person commits hazing when he or she knowingly requires the performance of any act by a student or other person in a school, college, university, or other educational institution of this State, for the purpose of induction or admission into any group, organization, or society associated or connected with that institution, if:

(1) The act is not sanctioned or authorized by that educational institution; and

(2) The act results in bodily harm to any person.

(b) Sentence. Hazing is a Class A misdemeanor, except that hazing that results in death or great bodily harm is a Class 4 felony.

720 ILCS 120/5. Laws 1901, p. 145, § 5, added by P.A. 89-292, § 5, eff. Jan. 1, 1996.

STATEMENT OF FACTS

The Litigation

Plaintiff, Gary L. Bogenberger, as special administrator of the estate of David R. Bogenberger, deceased, brought a wrongful death and survival action based on, *inter alia*, a violation of the Hazing Act against numerous defendants, which, after successive amendments, included the national fraternity organization, its local chapter, seven officers of the local chapter, twenty fraternity members, twenty-one women nonmembers, and the landlord of the local fraternity house (R.C3030-95).

Early in the litigation, plaintiff was given leave to issue subpoenas to the DeKalb Police Department, the DeKalb County States Attorney's Office and the Northern Illinois Police Department, subject to a confidentiality order (R.C23, 41-43). The subpoenaed police reports included summaries of forty-three statements from twenty-five fraternity members, sixteen pledges and two of the nonmember women guests who attended the event (R.C3151). In addition, the records produced included video/audio interviews of active fraternity members and most of the defendants named in the litigation (R.C3164). Plaintiff also obtained, through discovery in a related case pending in the court of claims against Northern Illinois University, 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). Plaintiff's counsel attached an affidavit to the fifth amended complaint attesting that the allegations of the pleadings and especially those based "upon information and belief" were drawn from his reading of various reports, recorded witness statements and media reports which he believed were true (R.C3095).

Plaintiff alleged in the fifth amended complaint that decedent, a fraternity pledge, was served and drank excessive amounts of alcohol, became unconscious, was left on a bed by a fraternity member and later died after participating in a fraternity pledge event known as "Mom's and Dad's Night" at a fraternity house on the campus of Northern Illinois University (R.C3030-3095). According to the fifth amended complaint, "Mom's and Dad's Night" was a common fraternity pledging activity of the Pi Kappa Alpha organization and other fraternities throughout the country, and it was alleged, "on information and belief," that unknown local executive fraternity officers, members of the

pledge board and fraternity members planned for one such event to be held at the local fraternity house on November 1, 2012 (R.C3032-33). Further, the plan was alleged to have included telling and requiring the pledges to drink excessive (R.C3033) and dangerous amounts of alcohol "to a point of insensate intoxication" (R.C3064). Pledges were told that the purpose of the event was for the pledges to learn who their Greek Mothers and Fathers were and to encourage the development of mentoring relationships, and that pledges were required to drink excessively as a mandatory prerequisite to active membership in the fraternity (R.C3033-34). Fraternity members were directed to obtain vodka and contact sorority women to serve as "Greek Mothers" for the event (R.C3034). On the night of the event, pledges went from room to room consuming vodka in response to questions asked, and any expressing a reluctance to drink were called "pussies" and "bitches" by the fraternity members and women who were participating in the event until they assented (R.C3034-35). At the conclusion of the event, which lasted approximately one and a half hours, each pledge had allegedly consumed approximately three-to-five four ounce cups of vodka in each of seven rooms (R.C3036).

According to the allegations, the pledges were led to the basement where they were given customized t-shirts, paddles and buckets (decorated by the women participants) and told the identity of their Greek parents (R.C3036). The pledges vomited on themselves and each other, and before they lost consciousness, unknown fraternity members placed the pledges in various designated places in the fraternity house (R.C3036). After the pledges had become unconscious and were placed in the designated areas, unspecified officers and fraternity members occasionally checked on them, including plaintiff's decedent, and discussed whether to call an ambulance or obtain

medical attention, but declined to do so and dissuaded others from doing so (R.C3036-37). Plaintiff's decedent, who had lost consciousness, was placed in a bed in his Greek Father's room by Gregory Petryka, an active member who tried to orient his head and body so he would not choke on his own vomit (R.C3036). Contrary to Northern Illinois University's policies on parties where alcohol was served at fraternities and sororities, the event had not been registered with the Student Involvement and Leadership Development (R.C3037).

Counts I and II of the fifth amended complaint were directed at defendants, Pi Kappa Alpha Corporation, Inc. and Pi Kappa International Fraternity; Inc. (R.C3037-51), counts III and IV were directed at Eta Nu Chapter of Pi Kappa Alpha International Fraternity at Northern Illinois University, Pi Kappa Alpha Corporation, Pi Kappa Alpha International Fraternity, and seven officers or pledge board members (R.C3051-62); counts V and VI were directed at seven officers and pledge board members individually (R.C3062-70); counts VII and VIII were directed at twenty members of the fraternity (R.C3070-79); counts IX and X were directed at twenty-one nonmember women students who attended the fraternity event (R.C3079-88); and counts XI and XII were directed at Pike Alum, LLC, the owner of the premises where the fraternity was located (R.C3088-94).

The Trial Court's Memorandum Opinion And Order

On December 11, 2014, the trial court granted defendants' section 2-615 motions to dismiss in a memorandum opinion and order (R.C3444-50).[1]

[1] A copy of the trial court's amended memorandum opinion and order, filed one day later on December 12, 2014 and made *nunc pro tunc* to December 11, 2014, is included in the appendix to this brief (A.1-8).

The trial court reviewed Illinois law before concluding that the existence of a narrow exception to social host liability was questionable at best in light of Illinois supreme court precedent (R.C3455). Even assuming that a cause of action could be stated within the narrow exception, the trial court determined that the fourth and fifth amended complaints were conclusory and failed to allege facts to establish that the fraternity required intoxication as a prerequisite for membership in violation of the Hazing Act (R.C3455). Plaintiff had alleged only that decedent believed that participation and excessive drinking were required for membership (R.C3455-56). Also lacking, according to the trial court, were specific allegations of well-pleaded fact as to the plan by unknown fraternity members requiring pledges to engage in dangerous and illegal activities as a prerequisite of fraternity membership, voluntary undertaking, joint liability and concerted action (R.C3456). The trial court read the fifth amended complaint as deficient in not identifying the individual defendants, fraternity officers, fraternity members and nonmember women students who committed any acts, either indicative of taking control over decedent or showing the concoction of a plan or scheme or illustrating how they acted in concert pursuant to a scheme or plan (R.C3456). Even as to the one fraternity member identified, Gregory Petryka, plaintiff did not allege any facts that showed that he took affirmative action and control which put decedent in a worse position to support a cause of action based on a voluntary undertaking (R.C3456-57). Finally, the trial court concluded that plaintiff had pled no facts as to the landlord giving rise to a duty with regard to the actions of its tenant, the local chapter of the fraternity, and that no claim had been stated against it (R.C3457).

Because plaintiff had been unable to state a cause of action after five opportunities to plead, and in light of the law against social host liability, the trial court granted the motions to dismiss without giving plaintiff leave to replead (R.C3457-58). Within 30 days, plaintiff appealed from the dismissal to the appellate court (R.C4101-02).

The Appellate Opinion

On June 13, 2016, the appellate court affirmed in part, reversed in part, and remanded for further proceedings.

After setting forth the procedural history giving rise to the appeal, the appellate court examined Illinois common law and legislation regarding alcohol-related liability. ¶¶ 1-15. The appellate court acknowledged that under the common law rule no cause of action lies in Illinois for injuries arising out of the sale or gift of alcohol, and that the Dramshop Act imposes a form of no-fault liability on dramshops for selling or serving intoxicating beverages to persons who subsequently injure third-parties. ¶ 16. The appellate court discussed relevant cases from this court regarding social host liability (¶¶ 16-19) and quoted this court's statement in *Charles v. Seigfried*, 165 Ill. 2d 482 (1995) that the legislature had preempted the "entire field of alcohol-related liability through passage and continued amendment of the Dramshop Act." ¶ 19.

The appellate court then turned its attention to *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill. App. 3d 231 (4th Dist. 1987) and *Haben v. Anderson*, 232 Ill. App. 3d 260 (3d Dist. 1992) (¶¶ 21-25), which recognized a common law cause of action, before concluding that a fraternity or a similar organization that requires a person to drink excessively for membership is not acting as a social host. ¶ 26. The

appellate court read *Charles* and *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003) as involving only social host liability, that this court had not defined exactly what it meant by social host liability, and that *Quinn* and *Haben* remained good law. ¶¶ 30-32.

Having held that a common law negligence action existed, the appellate court next determined that plaintiff stated a cause of action for negligence against the local fraternity officers and active members based on conduct that allegedly violated the Hazing Act, and that they had also assumed a voluntary undertaking to care for unconscious pledges. ¶¶ 36-40. The court further held that plaintiff stated a cause of action against the local fraternity when plaintiff alleged that the officers and pledge board members were acting within their authority in planning the event. ¶ 40. However, the appellate court held that plaintiff had failed to state causes of action against two of the corporate defendants, PKA Corp. and PKA International (¶¶ 41-47), the women nonmembers (¶ 48), and the local fraternity's landlord. ¶ 50. The appellate court affirmed in part, reversed in part, and remanded for further proceedings. ¶ 51.

ARGUMENT

Introduction: Standard of Review

A motion to dismiss, pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), challenges the legal sufficiency of a complaint based on defects apparent on its face. *Bell v. Hutsell*, 2011 IL 110724, ¶ 9. Dismissal under section 2-615 is proper where the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are insufficient to state a cause of action upon which relief can be granted. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). In ruling on a section 2-615 motion, the court is to construe the pleadings strictly against the pleader

and disregard conclusions of law or fact unsupported by specific factual allegations, and a pleading that merely paraphrases the law as though to say that the case will meet the legal requirements is insufficient. *Doe v. Calumet City*, 161 Ill. 2d 374, 385 (1994); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 424 (1981). Although the allegations in the complaint are to be interpreted in the light most favorable to the plaintiff, liberal construction cannot cure factual deficiencies. *Vincent v. Williams*, 279 Ill. App. 3d 1, 5 (1st Dist. 1996).

Review of a decision on a section 2-615 motion challenging the sufficiency of the pleadings is *de novo*. *Bell*, 2011 IL 110724, ¶ 9. Under a *de novo* standard, the court reviews the judgment, not the reasoning, of the trial court, and the reviewing court may affirm on any grounds appearing in the record regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago,* 168 Ill. 2d 83, 97 (1995).

The appellate court's recognition of a common law negligence action for injuries resulting from the overconsumption of alcoholic beverages is contrary to this court's repeated pronouncements. For well over a century, this court has stated that Illinois has no common law cause of action for injuries arising out of the consumption of alcoholic beverages; that the General Assembly has preempted the entire field of alcohol-related liability; and that any change in the law expanding alcohol-related liability should be made by the General Assembly or not at all. With its superior ability to determine public policy, the legislature has created a private action only under the Illinois Liquor Control Act of 1934 or against those persons at least 18 years of age who willfully supply alcohol to a minor under the Drug and Alcohol Impaired Minor Responsibility Act. The fact that

the legislature has preempted the entire field and created only criminal liability for plaintiff's alleged hazing injury bars recognition of a common law cause of action in favor of persons 18 years or older, including plaintiff's decedent, for injuries caused by overconsumption of alcohol during hazing activities. Nor can a cause of action be implied under the Hazing Act when violations resulting in serious bodily harm or death are Class 4 felonies and an implied civil action is unnecessary to enforcement of the Act.

Finally, plaintiff did not state a cause of action based on a voluntary undertaking. Despite access to hundreds of pages of records subpoenaed from the local police and Northern Illinois University, after ample opportunity, the plaintiff failed to set forth well-pled allegations of specific affirmative acts of substantial performance undertaken by any individual defendant to support a claim that as many as twenty-seven fraternity members somehow collectively took complete and exclusive control of plaintiff's decedent. As further demonstrated below, the appellate court should be reversed and the trial court affirmed as to the dismissal of counts V-VIII of the fifth amended complaint.

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

At issue on appeal is whether Illinois recognizes a common law negligence action in favor of an intoxicated 19-year old college student against defendants who supplied the alcohol or participated in an alleged alcohol-related hazing event at a college fraternity.

The clear and unequivocal answer from this court—without a single exception—has been to prohibit any common law action regardless of whether the intoxicated person is an adult, under age or a minor. Not only has this court declined all invitations to

recognize a new cause of action, this court has gone one step further and emphatically declared that the legislature has preempted the entire field of alcohol-related liability and that any change to liability should come from the legislature—or not at all.

A. This Court's Case Law To Date And The Applicable Illinois Civil Statutes Do Not Impose Alcohol-Related Liability Under The Facts Alleged In The Fifth Amended Complaint

Twice in the past twenty years this court has rejected invitations to create a common law action against those hosts who served alcohol to minors.

In *Charles v. Seigfried*, 165 Ill. 2d 482 (1995), the estate of a minor who was killed in an accident which took place after the minor drove away from a party while drunk brought suit against his social host who had supplied the alcohol. In a second action, a passenger who was riding with an intoxicated underage driver brought suit against the host of the gathering who had provided the alcohol. In consolidated appeals, this court was asked to recognize a new cause of action "against social hosts for serving alcoholic beverages to minors who are subsequently injured." 165 Ill. 2d at 483. This court declined the invitation to recognize "any form of social host liability." *Id.* It noted that "[t]he historic common law rule, adhered to in [Illinois], is that there is no common law cause of action against *any provider* of alcoholic beverages for injuries arising out of the sale or gift of such beverages." *Id.* at 486 (emphasis in the original). After reviewing more than a century of case law, this court was able to conclude with confidence that:

> ...few 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. Our appellate court has generally adhered to this fundamental rule and has declined to create a new cause of action, regardless of whether the case involved adults, underage persons, or minors; liquor vendors or social hosts.

Id. at 490 (internal citations omitted). This court grounded its refusal to recognize social

host liability on "Illinois' long history of legislative preemption of all alcohol-related liability [which] makes it especially appropriate for us to defer to the legislature...." *Id.* at 496. In conclusion, this court "decline[d]to create any form of social host liability. The question of whether, and to what extent, social host liability should be imposed in Illinois is better answered by the legislature." *Id.* at 504.

Eight years later in *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003), this court was asked to reconsider the refusal to recognize adult social host liability and overturn *Charles*. 203 Ill. 2d at 225-26. There, plaintiff, who was the mother of a sixteen-year old, brought suit against her daughter's social hosts and their hosts' father for negligently supplying alcohol to her daughter, which led to her unconsciousness and death. *Id.* This court began its analysis by defining "adult social hosts" as "persons 18 years of age and older who knowingly serve alcohol to a minor." *Id.* at 230. In once more rejecting social host liability, this court observed that in Illinois:

> ...the common law recognized no cause of action for injuries arising out of the sale or gift of alcoholic beverages. The legislature's adoption of the Dramshop Act (now codified as section 6–21 of the Liquor Control Act of 1934) (235 ILCS 5/6–21 (West 2000)) created a limited and exclusive statutory cause of action by imposing a form of no-fault liability upon dramshops for selling or giving intoxicating liquors to persons who subsequently injure third parties [citation omitted]. *Through its passage and continual amendment of the Dramshop Act, the General Assembly has preempted the entire field of alcohol-related liability.* [citation omitted.]

Id. at 231 (citing *Charles*, 165 Ill. 2d at 491) (emphasis added). In *Wakulich*, this court examined the extent to which the General Assembly had created civil liability. *Id.* at 236. As of 2003, when *Wakulich* was decided, the General Assembly imposed liability on only two classes of defendants: (1) dramshop owners, and (2) persons 21 years of age or older who pay for a hotel or motel room knowing that the room will be used by underage

persons for the unlawful consumption of alcohol (235 ILCS 5/6–21(a)). *Id.* This court noted that the statutory liability of these defendants was limited and extended only to third-parties—and not, as in this case, to the intoxicated person. *Id.* Otherwise, the General Assembly elected to treat the possession and consumption of alcohol by persons under the legal drinking age as a crime. *Id.*

After *Wakulich*, the General Assembly in 2004 enacted the Drug and Alcohol Impaired Minor Responsibility Act (740 ILCS 58/1 *et seq.* (West 2012)), which creates a cause of action when a person at least 18 years of age "willfully supplies" alcohol or illegal drugs to persons under 18 who injure themselves or a third-party.[2] Notably,

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[2] Section 5 of the Act provides:

> § 5. Responsibility of person who supplies alcoholic liquor or illegal drugs to a person under 18 years of age.
>
> (a) Any person at least 18 years of age who willfully supplies alcoholic liquor or illegal drugs to a person under 18 years of age and causes the impairment of such person shall be liable for death or injuries to persons or property caused by the impairment of such person.
>
> (b) A person, or the surviving spouse and next of kin of any person, who is injured, in person or property, by an impaired person under the age of 18, and a person under age 18 who is injured in person or property by an impairment that was caused by alcoholic liquor or illegal drugs that were willfully supplied by a person over 18 years of age, has a right of action in his or her own name, jointly and severally, for damages (including reasonable attorney's fees and expenses) against any person:
>
> (i) who, by willfully selling, giving, or delivering alcoholic liquor or illegal drugs, causes or contributes to the impairment of the person under the age of 18; or
>
> (ii) who, by willfully permitting consumption of alcoholic liquor or illegal drugs on non-residential premises owned or controlled by the person over the age of 18, causes or contributes to the impairment of the person under the age of 18.

740 ILCS 58/5 (West 2012).

plaintiff here did not attempt to plead a cause of action under the Act as decedent was 19 years of age when he made the decision to drink excessively during the fraternity pledge event. As he was not a minor, he was not a member of the class for whose protection the General Assembly enacted the law.

This court has emphasized that the legislature has the "superior ability" to investigate and balance the many competing societal, economic and policy considerations in determining public and social policy. *Wakulich*, 203 Ill. 2d at 232 (citing *Charles*, 165 Ill. 2d. at 493-94); *see also Blumenthal v. Brewer*, 2016 IL 118781, ¶ 77 (noting that the legislature is "far better suited" to declare public policy in the area of domestic relations); *Coleman v. East Joliet Fire Protection Dist.*, 2016 IL 117952, ¶ 59 (noting that determination of public policy is primarily a legislative function). As evidenced by its post-*Wakulich* codification of a cause of action in the Drug and Alcohol Impaired Minor Responsibility Act, the legislature knows how to enact statutes creating alcohol-related liability when it believes that public policy so requires. As it stands today, however, the General Assembly has determined as a matter of public policy that civil liability for alcohol-related injuries is explicitly limited to only three categories of defendants. The individual defendants, who are 18- to 21-year old members and officers of a college fraternity, do not fall into any of these three categories—they were not profiting liquor vendors, adults who paid for accommodations for the purpose of facilitating underage drinking and they were not persons who "willfully" supplied alcohol to a person younger than 18 years of age. No recovery was possible under these statutes. Plaintiff has never argued otherwise.

B. The Legislature Has Determined That The Hazing Act Is Effective To Punish Serious Violations As Class 4 Felonies Without Providing Civil Remedies

The appellate court followed *Quinn* and *Haben*, two pre-*Charles* decisions which recognized a common law action as an exception to the rule against social host liability. ¶¶ 21-26. In his answer to the petition for leave to appeal, plaintiff argued that if an action in favor of the intoxicated person is not implied under the Hazing Act, then excessive drinking as a form of hazing will be "allowed" to continue, contrary to the legislature's intent (at 5). Nothing could be further from the truth.

Rather than impose civil tort liability, the General Assembly has treated college hazing as a crime for more than a century. The Hazing Act was originally enacted in 1901 and made it a crime when one engaged in the practice of hazing and any one sustains "injury to his person." Hazing was defined to mean, in relevant part, a "pastime or amusement...for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others."[3] The Act faced constitutional challenge when invoked

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[3] The full text of the hazing statute at the time *Quinn* and *Haben* were decided read as follows:

> Whoever shall engage in the practice of hazing in this state, whereby any one sustains an injury to his person therefrom shall be guilty of a Class B Misdemeanor.

Ill. Rev. Stat. 1989, ch. 144, par. 221.

> The term 'hazing' in this act shall be construed to mean any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student or individual to ridicule for the pastime of others.

Ill. Rev. Stat. 1989, ch. 144, par 222.

to prosecute individuals involved in hazing (*People v. Anderson*, 148 Ill. 2d 15 (1992) (holding statute was not unconstitutionally vague)) and in 1995 the legislature passed the current statute, 720 ILCS 120/5, effective January 1, 1996. The Hazing Act now provides that a person commits "hazing" when he or she "knowingly requires" the performance of an act by a student or other person in a school, college, university or other educational institution for the purpose of induction or admission into any group, organization or society if the act is not sanctioned by the institution and the act results in bodily harm to any person. 720 ILCS 120/5 (West 1996).[4]

The legislative history reflects that the purpose of the amendment was, according to the bill's sponsor, to "clean up" the definition of hazing and "enhance" the penalty when death or great bodily harm resulted. 89th Ill. Gen. Assem., House Proceedings, March 21, 1995, at 124-25 (statements of Representative Cross). Significantly, while the punishment for hazing which resulted in serious bodily harm or death was made a Class 4 felony, the legislative history behind the Act does not refer to *Quinn* or *Haben*, discuss possible civil tort liability or damages, or suggest in any other way that the legislature intended civil tort liability for college students who allegedly commit hazing (alcohol-related or otherwise) would be grafted onto the Act. *Id.* at 124-42.

This court handed down its decision in *Charles* holding that the legislature had preempted the entire field of alcohol-related liability on March 30, 1995. If the General Assembly believed that it was desirable to create a cause of action when an alcohol-related act of hazing resulted in injury or death, it could have easily amended the Hazing Act or passed separate legislation to create a cause of action. In this manner the General

[4] The statute has since been re-codified, effective January 1, 2013, at 720 ILCS 5/12C-50.

Assembly could have defined the parameters of civil liability as it did in the Liquor Control Act and as it later did in the Drug and Alcohol Impaired Minor Responsibility Act. Instead, the legislature regards hazing as a crime. As the appellate court noted in this case, a subset of the officers and members faced criminal charges (¶ 40), but the legislature has not created a private right of action in the Hazing Act against these individuals—much less against other fraternity members who were *not* criminally charged.

As a result of the 1995 amendments, the Hazing Act punishes violations as a Class 4 felony when death or serious bodily harm results. A Class 4 felony is punishable by a sentence of not less than one year and not more than three years imprisonment as well as by the imposition of fines and orders of restitution. 730 ILCS 5/5.4.5-45(a), (e), (f) (West 2012). In amending the Act in 1995, the General Assembly was entitled to conclude that public policy was better served by treating hazing as a criminal offense punishable by imprisonment, fines and restitution than by creating a cause of action for injury to the intoxicated person. [5]

The fact that the General Assembly has enhanced criminal liability for hazing injuries after *Quinn* and *Haben* and created an explicit cause of action for injuries related to drinking by a minor or an underage person in only two circumstances distinct from hazing indicates that the General Assembly did not intend for courts to create a common

[5] Today, nine states in addition to Illinois classify hazing punishable as a felony in certain circumstances. *See*, Cal. Penal Code § 245.6 (West Supp. 2014); Fla. Stat. Ann. §§ 1006.63, 1006.135 (West 2013); Ind. Code Ann. § 35-42-2.5 (West 2014); Mich. Code Ann., Crim. Law § 750.411t (West Supp. 2012); Mo. Ann. Stat. §§578-.360-.365 (West 2011); N.J. Stat. Ann. §§ 2C:40-3-50-5 (West 2005); Tex. Educ. Code Ann. §§ 37.151-.157, 51.936 (West 2012); Utah Code Ann. § 76.5-107.5 (West Supp. 2013); Wis. Stat. Ann. § 948.51 (West 2005).

law action in favor of persons, including plaintiff's decedent, for alcohol-related injuries taking place during hazing activities. A strict construction is especially appropriate here as the Hazing Act is penal in nature. *Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 12.

Here, the appellate court cited the *Quinn* court's statement that violation of the Hazing Act, or any statute designed for the protection of human life, is *prima facie* evidence of negligence. ¶ 24 (citing *Quinn*, 155 Ill. App. 3d at 237-38). However, reviewing courts have refused all attempts to use violations of statutes as a basis for imposing alcohol-related civil liability. *See, e.g., Wakulich*, 203 Ill. 2d at 239-40 (rejecting plaintiff's argument that a minor's consumption of alcohol violated statute which made it a Class A misdemeanor to contribute to the delinquency of a minor); *Charles*, 165 Ill. 2d at 489 (noting that this court has rejected theories of liability based on "certain prohibited sales and activities within the Liquor Control Act of 1934"); *Doe v. Psi Upsilon International*, 2011 IL App (1st) 110306 (declining to recognize a cause of action for negligence against a fraternity which allegedly served alcohol to an underage college freshman resulting in her intoxication and subsequent rape elsewhere on theory that its assistance violated Gender Violence Act). The appellate decision in this case conflicts with this court's longstanding deference to the legislature's acknowledged competence and superior ability to determine and express public policy in the "*entire* field of alcohol-related liability" (emphasis added).

Nor can a private right of action be fairly implied in the Hazing Act. A private right of action will be implied only where there is a clear need to uphold and implement the public policy of the statute by providing an adequate remedy for its violation. *Abbasi*

v. Paraskevoulakos, 187 Ill. 2d 386, 393 (1999) (citing *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 391 (1982)). A private right of action is implied if: (1) plaintiff is a member of the class for whose benefit the statute was enacted; (2) plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. 187 Ill. 2d at 393. The fourth factor is the most important limitation on the power of a court to imply a cause of action because a cause of action may be implied "*only* in cases where the statute would be ineffective as a practical matter, unless such an action were implied." *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 464 (1999) (citing *Abbasi*, 187 Ill. 2d at 393) (emphasis added).

Given the 1995 amendments, it is unnecessary to imply a private right of action in the Hazing Act when the enhanced criminal penalties were adequate deterrents for any violation. The only conclusion that can be fairly drawn from the legislative history of the Hazing Act is that the legislature believes that violations of the Act should be treated as crimes. The legislature's purpose in amending the Hazing Act was fulfilled by the criminal prosecutions of fraternity members after decedent's death.

Collegiate hazing is far from a new issue and has been the subject of legislation for well more than a century. New York enacted the first state hazing law in 1894 (1894 N.Y. Laws 482-483), preceding the enactment of the Hazing Act by the Illinois legislature in 1901. The 1901 version of the Hazing Act was more specific than the New York statute, requiring that the victim of the alleged hazing "sustain an injury to his person" in order to constitute a violation, in addition to defining the concept of "hazing."

Ill. Rev. Stat. 1901, ch. 38, pars. 534-535. The Illinois legislature adjusted what the New York legislature had crafted seven years prior, demonstrating its capability and intent to provide limitations and parameters for the punishment of hazing. Had the legislature intended to provide for an accompanying civil remedy, it could have easily done so either in 1901, or in any amendment to the statute thereafter, including the 1995 amendment. By the time of the 1995 amendment, hazing statutes of other states that were then in place demonstrated a clear intent to allow for a cause of action by: (1) expressly creating one (Ohio); (2) stating that the statute did not preclude a civil action or penalty (Connecticut, Maine); or (3) granting immunity from civil liability that might otherwise be imposed to those reporting hazing and cooperating with its prosecution (Texas, Indiana).[6] Illinois chose none of these options in 1995 or thereafter.

C. This Court's Precedents Do Not Permit The Recognition Of An Exception For Alcohol-Related Injuries That Result From Hazing Activities

The appellate court followed *Quinn* and *Haben* and distinguished *Charles* and *Wakulich* from this case based on the reasoning that this court's decisions were limited to "social host" liability and that a fraternity is not acting as a social host when it serves

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[6] Ohio Rev. Code Ann. § 2307.44 (West 1995) ("Any person who is subjected to hazing, as defined in division (A) of section 2903.31 of the Revised Code, may commence a civil action for injury or damages,* * * *"); Conn. Gen. Stat. §53-23a(e) (West 1995) ("This section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy"); Me. Rev. Stat. Ann. tit. 20-a, § 10004(3) ("These penalties shall be in addition to any other civil or criminal penalty to which the violator or organization may be subject"); Tex. Education Code Ann. § 37.155 (West 1995) ("Any person reporting a specific hazing incident * * * is immune from civil or criminal liability that might otherwise be incurred * * * *"); Ind. Code § 35-42-2-2(e) (West 1995) ("A person * * * who (1) makes a report of hazing in good faith [or] (2) participates in good faith in a judicial proceeding resulting from a report of hazing; * * * is not liable for civil damages or criminal penalties that might otherwise be imposed because of the report or participation").

alcohol to someone who must drink to the point of intoxication to join. ¶ 26. However, this court's statements in *Charles*, 165 Ill. 2d at 491—that "[l]egislative preemption in the field of alcohol-related liability *extends* to social hosts who provide alcoholic beverages to another person" (emphasis added) and in *Wakulich*, 203 Ill. 2d at 231, that "the *entire* field of alcohol-related liability" (emphasis added) has been preempted—makes clear that legislative preemption is complete and admits no exception for those persons (at least those 18 years old) who choose to drink to join a fraternity or similar organization as was alleged in *Quinn* and *Haben*. Legislative preemption of "the entire field of alcohol-related liability" includes the common law liability recognized by the appellate court in this case and in *Quinn* and *Haben* because excessive drinking of alcohol (as a requirement of membership) is an essential element of the claim.

The rationale behind the common law rule, as the appellate court acknowledged (¶ 16), is that it is the drinking that proximately causes the injury, and that for reasons of public policy, the providing of alcohol is considered too remote to proximately cause the injury. *Charles*, 165 Ill. 2d at 486. This is as true for a fraternity or a similar organization providing the alcohol as it is for any other social host—*i.e.*, broadly defined as anyone who knowingly serves alcohol regardless of the drinker's age. *Wakulich*, 203 Ill. 2d at 230. Legislative preemption of the "entire field of alcohol-related liability" includes every social setting in which drinking can occur and leaves no room for judicial recognition of a common law action if it is against only a college student in a fraternity or similar organization which supplies the alcohol.

In his answer to the petition for leave to appeal, plaintiff relies on the rule that where the legislature chooses not to amend the statute to reverse a judicial construction, it

is presumed that the legislature has acquiesced in the court's statement of legislative intent (at 4-5, citing *Wakulich*, 203 Ill. 2d at 233). Plaintiff's argument is that the legislature did not amend the Hazing Act to exclude alcohol-related hazing after *Quinn* and *Haben* but amended it only to enhance the punishment if the hazing causes serious injury or death (at 5). Plaintiff's reliance on the presumption is misplaced here for at least three reasons.

First, the legislature may have assumed, as did the trial court below and the appellate court in *Wakulich v. Mraz*, 322 Ill. App. 3d 768, 773 (1st Dist. 2001), that *Quinn* and *Haben* did not survive this court's decisions in *Charles* and *Wakulich*. There would have been no reason for the General Assembly to amend the Act and exclude expressly what was never included in the first place. Second, there is no reason to apply the presumption of legislative acquiescence where the particular judicial construction at issue comes from the intermediate appellate court rather than from this court—which is the final arbiter of what a statute means. *Hampton v. Metropolitan Water Reclamation Dist.*, 2016 IL 119861, ¶ 9. Third, the presumption does not apply to the appellate court's creation of a new cause of action because "it is the province of our supreme court and/or the General Assembly, not the appellate court, to create new causes of action." *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶41 (quoting *Emery v. Northeast Illinois Regional Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1029 (1st Dist. 2007)). By enacting the 1995 amendments, the legislature did not acquiesce in the recognition of a common law cause of action adopted in *Quinn* and *Haben*, but instead clarified the statutory language and enhanced the punishment when serious harm or death resulted. The appellate court did not rely on a presumption of legislative acquiescence for its decision here and neither

should this court.

D. A Common Law Action Would Result In Unlimited Liability For Those Who Are Not Liquor Vendors Unlike The Liability Capped By The Liquor Control Act

In *Charles*, this court noted that to recognize a common law action for serving drinks in the home would result in liability that goes well beyond the limited liability the legislature created for liquor vendors in the Liquor Control Act. 165 Ill. 2d at 494-95. This court in *Charles* found it "incomprehensible" that a social host who is not a liquor vendor should be exposed to greater liability than "the profiting liquor vendor" (*id.* at 495). Yet this is precisely the result that the appellate court reached here and in *Quinn* and *Haben*.

The Illinois Liquor Control Act (235 ILCS 5/6-21(a) (West 2015)), which explicitly creates statutory causes of action against liquor vendors and those persons at least 21 years of age who pay for accommodations to facilitate underage drinking, caps the liability limits for causes of action brought under the Act in accordance with the consumer price index (CPI-U) during the preceding twelve-month calendar year.[7] Liability under the Act is further limited to injuries sustained by third-parties, as this court has noted, as opposed to injuries to intoxicated persons. *Wakulich*, 203 Ill. 2d at 236. The Drug and Alcohol Impaired Minor Responsibility Act limits recovery to those

[7] Based on previous determinations, the Illinois Liquor Control Commission adjusted 2015 liability limits for causes of action involving persons injured or killed on or after January 20, 2015, so that judgment or recovery is capped at $65,511.59 for each person incurring damages to the person or property and $80,070.21 for either loss of means of support or loss of society resulting from death or injury of any person. https://www.illinois.gov./ilcc/News/Pages/2015-Dram-Shop-Liaiblity (site last visited December 1, 2016).

persons who are younger than 18 years of age. Neither the Liquor Control Act nor Drug and Alcohol Impaired Minor Responsibility Act makes any provision for recovery by persons 18 years of age and older who are injured by their own intoxication. It would mark an unwarranted departure from principles of judicial restraint to create open-ended liability against college students when this court has long deferred to the legislature's determination of public policy—which has not created a cause of action in favor of intoxicated persons who are at least 18 years of age or civil remedies in the Hazing Act.

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

The appellate court further held that plaintiff stated a cause of action against twenty-seven individual defendants (fraternity members and officers) based on a voluntary undertaking to care for the inebriated pledges. ¶¶ 38-39.

This court has emphasized that a defendant's liability under the voluntary undertaking doctrine must be independent of the defendant's status as social host. *Bell*, 2011 IL 110724, ¶ 17 ("Indeed, it is irrelevant for purposes of plaintiff's voluntary undertaking counts"). Although the duty of care is limited to the extent of the undertaking (¶ 39), the appellate court did not acknowledge that "[t]he theory is narrowly construed." *Bell*, 2011 IL 110724, at ¶ 12.

In order to plead a voluntary undertaking claim, plaintiff had to set forth specific facts that showed that defendants took substantial steps in performing their undertaking. *Id.* at ¶ 26. Here, each of plaintiff's complaints, including the fifth and last, was devoid of allegations of specific affirmative acts of substantial performance undertaken by any

individual defendant to support a claim that twenty-seven fraternity member defendants somehow collectively took complete and exclusive control of decedent while he was helpless. An allegation made on information and belief, as many of plaintiff's allegations were, is not equivalent to an allegation of relevant fact. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40.

The trial court did not force plaintiff to plead in a vacuum. Despite access to thousands of pages of discovery, including statements from most fraternity members and officers, the criminal investigation conducted by the local police and the Northern Illinois University disciplinary proceedings, plaintiff never alleged specific facts against the individual fraternity officers and members to support a cause of action. Blanket allegations that unidentified fraternity officers and members discussed whether to seek medical assistance for intoxicated pledges (but not decedent specifically) but decided not to do so or checked on some pledges (but not decedent specifically) during the night were insufficient to support a voluntary undertaking. *Jackson v. Michael Reese Hospital,* 294 Ill. App. 3d 1, 11 (1st Dist. 1997) (plaintiff required to plead specific facts describing the affirmative conduct to show defendant's assumption of a duty) (citing *Nelson v. Union Rope Co.*, 31 Ill. 2d 69, 74 (1964)).

Allegations that the fraternity president, Alexander Jandick, had a breathalyzer (without claiming that he actually used it), or that a fraternity member, Gregory Petyka, placed decedent in bed in his fraternity room and attempted to elevate his head so he would not choke on his own vomit, fell short of substantial performance of an affirmative undertaking by twenty-seven fraternity members. Notably, while alleging that decedent was positioned in an attempt to avoid aspiration, plaintiff was careful not to allege that

the death was actually caused by aspiration; instead, the allegation was that his blood alcohol level reached .43 mg/dl (R.C3043). Simply put, there were no allegations of well-pled facts showing that twenty-seven fraternity members actively assumed complete and exclusive control over decedent and caused his death after he became intoxicated. What can be gleaned from the fifth amended complaint is that plaintiff intended to foist tort liability for a voluntary undertaking on *any* fraternity member who attended the event at some point in the evening or who was in communication with anyone who did.

The imposition of a legal duty under the voluntary undertaking theory is premised on the requirement that defendants' conduct "increased the risk of harm" to the person in the helpless situation. *Wakulich*, 203 Ill. 2d at 244. It is not sufficient to allege that defendants as social hosts for the event at the fraternity house collectively anticipated that pledges would find themselves in a helpless inebriated condition and then collectively assumed an open-ended duty to take affirmative steps to come to their aid. The appellate court unduly expanded the voluntary undertaking doctrine under *Wakulich* by holding that as many as twenty-seven individual defendants could be liable for not seeking medical care or calling 911 based on conclusory blanket allegations made on information and belief.

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.

Respectfully submitted,

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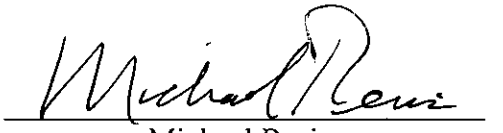
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The word count of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and those matters to be appended to the appendix pursuant to Rule 342(a), is 8,301 words.



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APPENDIX

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2016 IL App (1st) 150128

FIRST DIVISION
June 13, 2016

No. 1-15-0128

GARY L. BOGENBERGER, as special Administrator of the Estate of David Bogenberger, deceased, Plaintiff-Appellant, 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; 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 an 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 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; MICHAEL A. MARROQUIN; ESTEFAN A. DIAZ; HAZEL A. VERGARALOPE; MICHAEL D. PFEST; ANDRES J. JIMENEZ, JR.; ISAIAH LOTT; ANDREW W.	)	Appeal from the Circuit Court of Cook County No. 2013 L 1616

BOULEANU; NICHOLAS A. SUTOR; NELSON A. IRIZARRY; JOHNNY P. WALLACE; DANIEL S. POST; NSENZI K. SALASINI; RUSSELL P. COYNER; GREGORY PETRYKA; KEVIN ROSSETTI; THOMAS BRALIS; 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 MERRIL; MONICA SKOWRON; and PIKE ALUM, L.L.C.,

Defendants-Appellees.

Honorable
Kathy M. Flanagan,
Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Cunningham concurred in the judgment and opinion.
Justice Connors specially concurred.

OPINION

¶ 1 Plaintiff, Gary L. Bogenberger as special administrator of the estate of David Bogenberger, appeals the order of the circuit court granting a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West (2012)) in favor of defendants Pi Kappa Alpha Corporation, Inc., *et al*, on plaintiff's negligence complaint. On appeal, plaintiff contends the court erred in dismissing his complaint because (1) it stated a cause of action where the facts alleged that David's death resulted from his required participation in a fraternity event and actions that violated the Criminal Code of 2012 (Hazing Act) (720 ILCS 5/12C-50 (West 2012)); (2) it stated a cause of action showing that defendants voluntarily undertook the duty to care for intoxicated pledges; (3) it stated a cause of action as to the nonmember participants because they were recruited by the fraternity to participate in the hazing;

and (4) it stated a cause of action as to the landlord of the premises because the landlord was aware of the hazing activity. For the following reasons, we reverse the dismissal as to defendants Eta Nu Chapter of Pi Kappa Alpha International Fraternity at Northern Illinois, the named executive officers and pledge board members of the Eta Nu Chapter of Pi Kappa Alpha, and named active fraternity members. However, we affirm the dismissal as to Pi Kappa Alpha Corporation, Inc. (PKA Corp.), Pi Kappa Alpha International Fraternity (PKA International), the nonmember defendants, and Pike Alum, L.L.C. (Pike Alum).

¶ 2 JURISDICTION

¶ 3 The trial court entered its order dismissing plaintiff's complaint on December 12, 2014, *nunc pro tunc* to December 11, 2014. Plaintiff filed his notice of appeal on January 9, 2015. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. May 30, 2008) governing appeals from final judgments entered below.

¶ 4 BACKGROUND

¶ 5 Plaintiff's son, David Bogenberger, was a prospective pledge of Pi Kappa Alpha fraternity at Northern Illinois University (NIU). While participating in a fraternity event David became intoxicated, lost consciousness, and subsequently died. Plaintiff, as special administrator of David's estate, filed a four-count negligence complaint seeking recovery under the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2012)) and the Survival Act (755 ILCS 5/27-6 (West 2012)). Pursuant to subpoenas issued to the De Kalb police department, De Kalb county State's attorney's office, and the NIU police department, plaintiff filed a 10-count amended complaint. Defendants filed a section 2-615 motion to dismiss, which the trial court granted because although plaintiff alleged that pledges were required to consume an excessive amount of alcohol to obtain membership in the fraternity, plaintiff did not plead specific facts to

trigger social host liability under Illinois law. The trial court gave plaintiff leave to file a second amended complaint.

¶ 6 Plaintiff filed a second and third-amended complaint, which the trial court again dismissed pursuant to section 2-615. The trial court, however, gave plaintiff leave to file a fourth-amended complaint. Before filing the complaint, plaintiff filed motions to clarify the trial court's ruling and to conduct discovery. The trial court denied plaintiff's motion to clarify and plaintiff, in response to the trial court's grant of defendants' motions for a protective order and to quash deposition notices, withdrew his motion to conduct discovery. Plaintiff then filed a fourth-amended complaint, and defendants filed a motion to dismiss. While defendants' motion was pending, plaintiff requested leave to file a fifth-amended complaint which the trial court granted.

¶ 7 Plaintiff's twelve-count, fifth-amended complaint alleged that upon information and belief, employees or agents of PKA Corp. and/or PKA International encouraged officers and/or active members of the Eta Nu chapter at NIU to hold "Greek Family Night" events as part of the pledging process. The complaint alleged that the pledging process consisted of fraternity events designed to familiarize fraternity members with potential new members (pledges) before they vote on whether to initiate a pledge into the fraternity. It alleged that the executive officers of the Eta Nu chapter, as well as members of the pledge board and other active members, planned a "Mom and Dad's Night" pledge event to be held at their fraternity house on November 1, 2012.

¶ 8 The complaint alleged that the event called for two or three "Greek couples" assigned to each of the designated seven rooms in the fraternity to ask pledges various questions and give each pledge a required amount of alcohol. Women in sororities were contacted to be the "Greek Mothers" at the event. Active members of the fraternity participating in the event

selected a pledge for whom he and a designated woman would be the pledge's "Greek Mother and Father." The executive officers had breathalyzers to monitor the blood alcohol content of the pledges. The pledges were informed that attendance and participation in "Mom and Dad's Night" was mandatory. The complaint alleged that upon information and belief, David and the other pledges believed that attendance and participation in "Mom and Dad's Night" was a required condition for being initiated into the fraternity. The event was not registered with, or otherwise sanctioned by, NIU.

¶ 9 On November 1, 2012, David and other pledges arrived at the fraternity house, were divided into groups of two or three, and given a list of rooms in the house to enter following a designated order. Each pledge was given a four-ounce plastic cup which he brought with him to each room he visited. At each room, the pledges were asked questions and no matter their responses were required to consume vodka given by the active members and women in the room. If pledges showed reluctance to drink, the active members and women would call them "pussies" and "bitches" until they drank. After progressing through the seven rooms, each pledge had consumed three to five glasses of vodka in each room within one and a half hours. With assistance from the active members and sorority women participating, because they could no longer walk on their own, the pledges were then taken to the basement of the fraternity house where they were told the identity of their Greek parents, and given t-shirts, paddles, and buckets in which to vomit.

¶ 10 The complaint alleged that the pledges "vomited on themselves, each other, in rooms and on hallway floors." They also began to lose consciousness. Members of the fraternity placed the pledges in designated places throughout the fraternity house, and member Gregory Petryka put David into his Greek father's room. The complaint alleged that Petryka tried to orient

David's "head and body so that if he vomited, he would not choke on it." Executive officers Alexander M. Jandick and Patrick W. Merrill sent a mass text to other officers and active members stating, "if you or any girl you know has a pic or vid of a passed out pledge delete it immediately. Just do it." Upon information and belief, officers and active members checked on the pledges occasionally and adjusted their positions so they would not choke. After the pledges lost consciousness, the active members and officers decided to instruct members not to call 911 or seek medical care for them. David subsequently died with a blood alcohol level of .43 mg./dl.

¶ 11 Counts I and II of the complaint are directed at PKA Corp. and PKA International; counts III and IV are directed at Eta Nu chapter at NIU and the named seven officers; counts V and VI are directed at named pledge board members; counts VII and VIII are directed at named active members of the fraternity who participated in the event; counts IX and X are directed at named, nonmember women who participated in the event; and counts XI and XII are directed at the owner of the premises where the event occurred, Pike Alum. For brevity and clarity purposes, we will discuss the specific allegations of each count as it becomes relevant to our disposition of the case.

¶ 12 Defendants filed a section 2-615 motion to dismiss. On December 11, 2014, the trial court issued its order dismissing plaintiff's complaint. The trial court acknowledged that *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill. App 3d 231 (1987), and *Haben v. Anderson*, 232 Ill. App. 3d 260 (1992), held that a complaint states a cause of action if it alleges that the plaintiff was required to drink to intoxication to become a member, and the conduct violated the Hazing Act. However, it questioned the viability of those cases after the supreme court's decision in *Charles v. Seigfried*, 165 Ill. 2d 482 (1995), given the breadth and scope of the

holding in *Charles*. The trial court also found that plaintiff's allegations were conclusory and lacked factual specificity as to all defendants. Further, as to the nonmember women defendants, the trial court found that the Hazing Act did not apply to nonmembers of an organization. Since plaintiff had five opportunities to state a claim, the trial court determined that "it does not appear likely that [he] will be able to properly state a cause of action against these Defendants." The trial court therefore dismissed the complaint with prejudice. On December 12, 2014, the trial court issued an amended order, *nunc pro tunc* to December 11, 2014, to include other defendants. Plaintiff filed this timely appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff first contends that the trial court erred in dismissing his negligence complaint where the facts alleged that David's death resulted from his required participation in a fraternity event and the actions violated the Hazing Act. Defendants argue that dismissal was proper because plaintiff's claim is based on social host liability and Illinois common law does not recognize a duty owed by social hosts in serving alcohol to their guests.

¶ 15 To prevail on a negligence claim, plaintiff must show that defendants owed a duty, they breached their duty, and the defendants' breach was the proximate cause of injury. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). If no duty is owed to plaintiff, plaintiff cannot recover in tort for negligence. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). Whether a duty exists is a question of law for courts to decide. *Krywin*, 238 Ill. 2d at 226. The question before us is whether defendants owed a duty to David where David was required to consume excessive amounts of alcohol as part of a fraternity pledging activity, and he subsequently died as a result of his excessive alcohol

consumption. To make this determination, we examine Illinois common law and legislation regarding alcohol-related liability.

¶ 16 Our supreme court has repeatedly recognized the common law rule in Illinois that no cause of action exists for injuries arising out of the sale or gift of alcoholic beverages. *Charles v. Seigfried*, 165 Ill. 2d 482, 486 (1995). The reasoning behind the rule is that the drinking of the alcohol, not the selling or serving of it, is the proximate cause of intoxication and resulting injury. *Id.* However, the Illinois legislature "created a limited statutory cause of action when it enacted the original Dramshop Act of 1872" (Dramshop Act). *Id.* The act imposed a form of no-fault liability on dramshops for selling or serving intoxicating beverages to individuals who subsequently injure third parties. [1] *Id.* at 487. In *Cruse v. Aden*, 127 Ill. 231 (1889), the supreme court refused to extend liability under the Dramshop Act to social hosts who give "a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness." Relying on principles underlying the common law rule, the court reasoned that it was not a tort at common law to give alcoholic beverages to " 'a strong and able-bodied man' " and therefore a claim based on social host liability "can in no sense be regarded as an action of tort at common law." *Id.* at 234.

¶ 17 Other cases since *Cruse* tested its broad holding that no social host liability exists for alcohol-related injuries. In *Cunningham v. Brown*, 22 Ill. 2d 23, 24 (1961), the supreme court considered whether to recognize a common law remedy allowing recovery against a tavern where plaintiff's decedent, who became despondent after being served alcohol, subsequently took his own life. Since legislation provided remedies against tavern owners only for third party

[1] The act in its present incarnation, the Liquor Control Act of 1934 (Liquor Control Act) (235 ILCS 5/6-21 (West 2010)), grants to third parties a similar cause of action.

injuries caused by an intoxicated person, the plaintiff could not recover under the Liquor Control Act. The plaintiff also acknowledged that the common law provided no remedy for the mere sale of alcohol to a person because it is the drinking, not the selling, of alcohol that is the proximate cause of intoxication. *Id.* at 30. However, the plaintiff argued for an exception to the common law rule, reasoning that "where a sale is made to one who is intoxicated or insane and the incapacity of the consumer to choose [to drink] is known to the vendor *** then the sale and consumption are merged and in reality become the act of the seller and the proximate cause of the intoxication." *Id.*

¶ 18 The supreme court in *Cunningham* acknowledged that "plaintiff's argument has some merit, and if no more were involved than laying down a new rule of liability it would warrant more serious consideration." *Id.* Instead, the legislature through the Liquor Control Act had provided a remedy against tavern owners for alcohol-related injuries and the supreme court was unwilling to create a common law remedy that would be "almost coincidental with the remedy provided" by the Liquor Control Act. *Id.* Therefore, it held that "the Liquor Control Act provides the only remedy against tavern operators and owners of tavern premises for injuries to person, property or means of support by an intoxicated person or in consequence of intoxication." *Id.* at 30-31.

¶ 19 In *Charles*, the supreme court considered whether an exception to the common law rule exists where social hosts knowingly serve alcohol to minors who become intoxicated and suffer serious injury or death as a result. *Charles*, 165 Ill. 2d at 484. Prior to its analysis, the supreme court strongly emphasized the continued validity of the common law rule and its intent to adhere to "well-established law." *Id.* at 486. It stated that "[f]or over one century, this court has spoken with a single voice to the effect that no social host liability exists in Illinois" and that

"no common law cause of action for injuries arising out of the sale or gift of alcoholic beverages" exists. *Id.* The supreme court proceeded to outline the history of the common law rule regarding social host liability, including discussions of *Cruse* and *Cunningham*. It noted its holding in *Cunningham* that the Dramshop Act provides the exclusive remedy against tavern owners and operators for alcohol-induced injuries, and determined that *Cunningham* "firmly established the rule of law that, in Illinois, the General Assembly has preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dramshop Act." *Id.* at 488-89. In *Charles*, the supreme court determined that this "[l]egislative preemption in the field of alcohol-related liability extends to social hosts who provide alcoholic beverages to another person, whether that person be an adult, an underage person, or a minor." *Id.* at 491. Therefore, it held that no common law cause of action exists where a social host serves alcohol to minors; in other words, social hosts owe no duty to minors under the common law when serving them alcohol. *Id.*

¶ 20 *Charles* also discussed public policy reasons for leaving this issue in the hands of the legislature rather than with the courts, finding that the legislature, "by its very nature, has a superior ability to gather and synthesize data pertinent to the issue." *Id.* at 493. It noted the difficulty courts would face in determining social host liability amid the multiple parties who could be held liable, and in defining liability so as to avoid a "flood of injured litigants" from crowding the courts. *Id.* at 494. The court expressed concern that by creating this exception to the common law rule, liability for social hosts who merely serve alcoholic beverages to guests in their home "would be unlimited" whereas the Dramshop Act limits liability for liquor vendors for each compensable injury. *Id.* The supreme court further noted that review of the Liquor Control Act's legislative history showed that "the General Assembly has deliberately chosen *not*

to impose social host liability upon adults who provide alcoholic beverages to persons under the legal drinking age." (Emphasis in original.) *Id* at 501. It concluded that "[j]udicial action in the face of these legislative decisions would be ill-advised." *Id.*

¶ 21 Plaintiff here challenges the applicability of *Charles*, arguing that this is not a social host case and that his cause of action is more in line with the claims in *Quinn* and *Haben*. In *Quinn*, the complaint alleged that the plaintiff, an 18-year-old pledge of the defendant fraternity, was required to participate in an initiation ceremony. *Quinn*, 155 Ill. App. 3d at 233. The ceremony involved members directing each pledge to drink a 40-ounce pitcher of beer without letting the pitcher leave the pledge's lips or until the pledge vomited. The plaintiff complied, became intoxicated and could not properly care for himself. After drinking the pitchers, the pledges went to a tavern where an active member directed the plaintiff to drink from an 8-ounce bottle of whiskey. The plaintiff complied although the complaint did not specify the amount he drank from the bottle. At the tavern, the active members purchased more alcohol for the pledges. *Id.* at 233-34.

¶ 22 The complaint alleged that as a result of this excessive drinking, the plaintiff "became extremely intoxicated" and after being brought back to the fraternity, he was left on the hardwood floor to sleep off his intoxication. When he awoke, the plaintiff found he could not use his hands or arms properly and was taken to the hospital. His blood alcohol level, measured almost 15 hours after he had fallen asleep at the fraternity, registered at .25. The plaintiff alleged that as a result of his extreme intoxication, he suffered neurological damage to his arms and hands. *Id.* at 234.

¶ 23 The question before the appellate court was whether a fraternity owed a common law duty to its pledge where the pledge was required to consume an excessive amount of alcohol, and

he then became intoxicated and suffered neurological damage as a result. *Id.* at 233-34. The court acknowledged that to recognize a cause of action in negligence in this case would put the decision "perilously close to the extensive case law prohibiting common law causes of action for negligently selling alcohol." *Id.* at 235. However, the *Quinn* court was careful to point out that the facts in the complaint alleged something more than the mere furnishing of alcohol. *Id.* at 237. Instead, the situation consisted of a "fraternity function where [the] plaintiff was required to drink to intoxication in order to become a member of the fraternity" and as a result the plaintiff's blood alcohol level was " 'at or near fatal levels.' " *Id.* Although the plaintiff could have voluntarily walked away from the fraternity, the complaint alleged that fraternity membership was a " 'much valued status' " that perhaps blinded him "to any dangers he might face." *Id.* The court also considered the nature of the duty and found that the alleged injury was foreseeable, the burden on defendant to guard against the injury was small, and that the burden is properly on the fraternity since it was in control of the activities requiring pledge participation. *Id.* at 237. Therefore, the court recognized a cause of action in negligence for injuries sustained by pledges who were required to participate in "illegal and very dangerous activities" to obtain fraternity membership. *Id.*

¶ 24 The *Quinn* court cautioned, however, that this duty should be construed narrowly and that it was basing its decision on two factors. *Id.* First, the fact that the plaintiff was required to drink to intoxication, via social pressure to comply with initiation requirements, placed him in a position of being coerced that is distinguishable from the social host-guest context. *Id.* at 237-38. Second, the legislature enacted the Hazing Act to protect persons like the plaintiff from embarrassing or endangering themselves through thoughtless and meaningless activity. A

violation of the Hazing Act, or any statute "designed for the protection of human life or property is *prima facie* evidence of negligence." (Internal quotation marks omitted.) *Id.*

¶ 25 In *Haben*, the third district extended *Quinn* to recognize a cause of action in negligence against members of the Western Illinois University Lacrosse Club where the plaintiff's 18-year-old decedent sought membership in the high-status club, and the initiation ceremony traditionally included hazing activities and excessive drinking. *Haben*, 232 Ill. App. 3d at 262-63. The court saw no reason to limit *Quinn* to organizations, and although the plaintiff did not allege that the decedent was required to drink alcohol, he did allege that excessive drinking was a *de facto* requirement that came into existence through years of tradition. *Id.* at 266-67.

¶ 26 *Quinn* and *Haben* determined that a situation where a person is required by those "serving" alcohol to consume excessive amounts in order to become members of an exclusive, highly valued organization is not a social host situation, and therefore the organization owes that person a duty to protect him from engaging in harmful and illegal activities. These cases are factually on point with the case before us. Like *Quinn* and *Haben*, plaintiff here alleged that David was required to drink excessive amounts of alcohol in order to obtain membership in a highly valued organization, the Eta Nu chapter of the Pi Kappa Alpha fraternity. He also alleged that pledges faced social pressure to comply with the fraternity's requests and that participation in such activity violated the Hazing Act. See *Quinn*, 155 Ill. App. 3d at 237-38. Following *Quinn* and *Haben*, we find that we are not presented with a social host situation here and plaintiff has alleged a duty on which a cause of action for common law negligence can be based.

¶ 27 Defendants disagree, arguing that *Charles*, which was decided after *Quinn* and *Haben*, and the subsequent supreme court case *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003), effectively

overruled those appellate cases even if the supreme court did not explicitly overrule them. They point to language in *Charles* finding "that the General Assembly has preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dramshop Act." *Charles*, 165 Ill. 2d at 491. Defendants argue that the appellate court in *Wakulich* noted this language in *Charles* and concluded that the "exception" created by *Quinn* did not survive *Charles*. *Wakulich v. Mraz*, 322 Ill. App. 3d 768, 773 (2001). In affirming the dismissal of plaintiff's claim in *Wakulich*, our supreme court adhered to its decision in *Charles* that no social host liability exists in Illinois, even where the host serves alcohol to a minor who subsequently suffers an injury. *Wakulich*, 203 Ill. 2d at 237. The court in *Wakulich* also reiterated its belief that the General Assembly is the body best equipped to determine social host liability issues. *Id.* at 235-36.

¶ 28 Defendants further argue that in response to *Wakulich*, the General Assembly passed the Drug or Alcohol Impaired Minor Responsibility Act (740 ILCS 58/1 *et seq.* (West 2012)), which created a civil cause of action when a person over 18 years of age "willfully supplies" alcohol or illegal drugs to minors who injure themselves or a third party. They contend that this legislative action indicates the General Assembly's desire to preempt the entire field of alcohol related liability, as our supreme court held in *Charles* and *Wakulich*, and because the legislature has been silent regarding the service of alcohol to a person over the age of 18 on the facts we have here, plaintiff has no claim.

¶ 29 We agree with defendants that our supreme court in *Charles* and *Wakulich* held that social host liability does not exist in Illinois common law. However, we disagree with defendants' characterization of plaintiff's claim as one based on social host liability. As the appellate court found in *Quinn*, here "we are faced with a situation which consists of more than

the mere furnishing of alcohol. The facts, as alleged in plaintiff's amended complaint, describe a fraternity function where plaintiff was required to drink to intoxication in order to become a member of the fraternity." *Quinn*, 155 Ill. App. 3d at 237. We agree with *Quinn* that this situation is distinguishable from the social host circumstances found in *Charles*, *Wakulich*, and other social host liability cases.

¶ 30 Furthermore, we do not agree that *Charles* and *Wakulich* effectively overruled *Quinn* and *Haben*. When our supreme court discussed preemption in *Charles*, finding that the "General Assembly has preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dramshop Act," it was referring to *Cunningham*, a case involving tavern owners serving alcohol to a paying customer. *Charles*, 165 Ill. 2d at 488-89. The plaintiff in *Charles*, however, alleged improper service of alcohol to a minor in the host's home. Throughout its opinion our supreme court referred to this as social host liability. The court then held that "[l]egislative preemption in the field of alcohol-related liability extends to social hosts who provide alcoholic beverages to another person, whether that person be an adult, an underage person, or a minor." *Id.* at 491. *Charles* did not provide a definition for social host.

¶ 31 Our supreme court revisited the issue in *Wakulich*, another social host liability case involving the service of alcohol to a minor. In *Wakulich*, the court refused to overturn *Charles* and adhered to its decision that "apart from the limited civil liability provided in the Dramshop Act, there exists no social host liability in Illinois." *Wakulich*, 203 Ill. 2d at 237. The court did provide a general definition of "adult social hosts" in the context of the facts before it as "persons 18 years of age and older who knowingly serve alcohol to a minor." *Id.* at 230. However, our supreme court provided no further analysis on the issue.

¶ 32 In fact, contrary to defendants' assertion that our supreme court effectively overruled *Quinn* and *Haben*, thereby extending the definition of social host to fraternities and members who plan an event where pledges are required to consume dangerous amounts of alcohol, *Wakulich* instead shows the court's acknowledgement that this situation is a "factually distinct scenario" from one in which a minor is allegedly pressured to drink at a private residence. *Id.* at 240. Although the appellate court in *Wakulich* concluded that "the liability exception created by *Quinn*" did not survive *Charles*, our supreme court in affirming the dismissal in *Wakulich* did not make the same determination. *Wakulich*, 322 Ill. App. 3d at 773. Rather, our supreme court noted the lower court's conclusion but found it "unnecessary to consider whether the so-called 'exception' to the rule against social host liability recognized by *Quinn* and *Haben* is compatible with our decision in *Charles* because the present case simply does not come within the reach of these two appellate opinions." *Wakulich*, 203 Ill. 2d at 239. The court recognized that *Quinn* and *Haben* "addressed the limited situation" of illegal or dangerous activities conducted by college fraternities or similar organizations, and that to extend their holdings to a case involving the service of alcohol to a minor at a residence would be a " 'dramatic expansion' " of those cases, "assuming their continuing viability." *Id.* at 240. Our supreme court did not conclusively state that it was overruling *Quinn* and *Haben*, but instead determined that the facts before it were distinguishable from the facts of those appellate opinions. Neither the supreme court nor the General Assembly have conclusively determined otherwise. We find that the holdings in *Quinn* and *Haben* are still viable and, following those factually on-point cases, we hold that plaintiff here has sufficiently alleged a common law cause of action in negligence.

¶ 33 Plaintiff, however, must still allege sufficient facts to support his negligence claim or face a section 2-615 dismissal upon defendants' motion. A section 2-615 motion to dismiss challenges the sufficiency of the complaint based on defects apparent on its face. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 13. In reviewing the sufficiency of a complaint, we take as true all well-pleaded facts and all reasonable inferences drawn from those facts. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 96-97 (2004). We also view the allegations in the complaint in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005). Plaintiff, however, must allege sufficient facts to bring the claim within a legal cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

¶ 34 We recognize that a number of allegations in the complaint are made "upon information and belief." "Where facts of necessity are within defendant's knowledge and not within plaintiff's knowledge, a complaint which is as complete as the nature of the case allows is sufficient." *Yuretich v. Sole*, 259 Ill. Ap. 3d 311, 313 (1994). This court has acknowledged that " '[a]n allegation made on information and belief is not equivalent to an allegation of relevant fact' [citation], but at the pleading stage a plaintiff will not have the benefit of discovery tools" to discern certain facts. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 40. However, plaintiff will have knowledge of how he learned of the facts alleged upon information and belief, and the complaint therefore should allege how those facts were discovered. *Id.* Here, plaintiff's counsel attached an affidavit to the complaint stating that the allegations made "upon information and belief" are based on [his] reading of various summary reports, recorded witness statements and media reports." The affidavit also states that due to pending criminal proceedings, counsel does not have access to certain defendants and unindicted

witnesses requiring him to allege certain facts and conduct as "presently unknown." The use of "upon information and belief" in plaintiff's complaint here does not render the allegations insufficient under section 2-615.

¶ 35 We now consider the merits of plaintiff's appeal. We review *de novo* the trial court's dismissal of a claim under section 2-615. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). For clarity, we will address the sufficiency of plaintiff's pleadings for each group of defendants specified in the complaint.

¶ 36 We first consider plaintiff's allegations against the named officers and pledge board members, individually and as officers and pledge board members (counts V, VI), and the active members (counts VII, VIII). The complaint alleged that the officers and pledge board members of the Eta Nu chapter met on October 29 or 30, 2012, and planned and approved of Mom and Dad's night as a pledge event in which participation was required as a condition of membership. On November 1, 2012, these defendants participated in the event which required pledges to visit a list of rooms in the fraternity house. The pledges were given a four-ounce plastic cup by the officers and board members, and in each room the cup was filled with vodka. The participating active members and women in each room asked each pledge a series of questions and after responding the pledges were required to drink from his cup of vodka. The complaint alleged that after progressing through the rooms, each pledge had consumed three to five glasses of vodka in each room in approximately one and a half hours. It further alleged that the event was not sanctioned by NIU and violated the Hazing Act.[2]

[2] The Hazing Act defines hazing as when a person "knowingly requires the performance of any act by a student or other person in a school, college, university or other educational institution of this State, for the purpose of induction or admission into any group, organization, or society associated or connected with that institution" if not sanctioned by the institution and results in

¶ 37 We find that plaintiff's complaint alleged sufficient facts to support his claim that David was required to drink to extreme intoxication in order to become a member of the fraternity, and that this conduct violates the Hazing Act. See *Quinn*, 155 Ill. App. 3d at 237-38. The complaint specifically pled that the named officers and pledge board members of the Eta Nu chapter planned the event and required participation by the pledges, and details how their actions and decisions led to David's intoxication. Taking as true all well-pleaded facts and all reasonable inferences drawn therefrom, plaintiff has alleged sufficient facts to bring his claim within a legal cause of action as to these defendants.

¶ 38 Plaintiff also alleged liability premised on the breach of defendants' duty of due care that arose when they voluntarily undertook to care for the unconscious pledges. In undertaking the care of the pledges, defendants "were obligated to exercise 'due care' in the performance of the undertaking." *Wakulich*, 203 Ill. 2d at 242. As stated in section 323(a) of the Restatement (Second) of Torts, liability attaches upon defendants' failure to exercise reasonable care in performing a voluntary undertaking if "his failure to exercise such care increases the risk of such harm." Restatement (Second) of Torts § 323(a), at 135 (1965). In *Wakulich*, the plaintiff alleged that the defendants took the minor to the family room for observation after she lost consciousness, observed her vomiting and making gurgling sounds, checked on her the following morning when she was still unconscious, removed her soiled blouse, and placed a pillow under her head to prevent aspiration. They refused to seek medical care and prevented others from obtaining medical care for her. They also refused to take her home or contact her parents. When she was still unconscious, defendants removed the minor from their home. *Wakulich*, 203 Ill. 2d at 241. Our supreme court found that plaintiff's allegations sufficiently alleged that

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bodily harm to any person. 720 ILCS 5/12C-50 (West 2012).

their conduct increased the risk of harm to her, and the trial court should not have dismissed the counts based on a voluntary undertaking theory. *Id.* at 247.

¶ 39 This duty, however, is limited by the extent of the undertaking. *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32 (1992). Although it may be true as a general proposition that a host who merely allows an intoxicated guest to "sleep it off" on the floor does not assume an open-ended duty of care, plaintiff's complaint alleged more than merely allowing pledges to "sleep it off." See *Wakulich*, 203 Ill. 2d at 243. The complaint alleged that as the pledges began to lose consciousness, "presently-unknown active members" placed them in designated areas throughout the fraternity house. David was placed in a bed where active members tried to orient his head and body so he would not choke on his vomit. Active members occasionally checked on the unconscious pledges and would adjust their positions so they would not choke if they vomited. The complaint alleged that unknown officers and active members discussed whether to seek medical attention for the pledges, but decided not to and told others not to seek medical care or call 911. According to the allegations, defendants effectively took complete charge of the pledges, including David, after they become unconscious. Liberally construed and taken as true, these allegations sufficiently plead a cause of action based on a voluntary undertaking theory.

¶ 40 Plaintiff has also sufficiently pled a cause of action against the Eta Nu chapter of PKA (counts III and IV), since the elected officers and pledge board members of the Eta Nu chapter were acting within the scope of their authority in planning and executing the event. See *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 691 (1998) (corporate entities are bound by the actions of their officers and directors if performed within the scope of their authority). We are mindful that at this stage, we consider only whether plaintiff sufficiently pled facts to support

his claim of negligence. Whether defendants actually required that David and other pledges consume excessive amounts of alcohol for membership into the fraternity, whether the pledges actually felt intense pressure to drink, and whether defendants actually took affirmative measures to care for the unconscious pledges are questions for the trier of fact to decide. As the courts in *Quinn* and *Haben* noted, "[t]o the extent that plaintiff acted willingly, liability can be transferred to him under principles of comparative negligence." *Quinn*, 155 Ill. App. 3d at 237. Although we find that the trial court erred in granting the motion to dismiss on counts III, IV, V, VI, VII, and VIII, we make no determination as to defendants' actual liability.

¶ 41 Next we consider counts I and II, which pertain to defendants PKA Corp. and PKA International. Although plaintiff does not explicitly state that he seeks recovery based on both a direct theory of negligence as well as on a theory of vicarious liability, the language used in these counts appears to reference both theories of liability. Therefore, we will consider whether plaintiff's pleadings sufficiently alleged facts to support both theories of liability.

¶ 42 Under a theory of vicarious liability, or *respondeat superior*, a principal can be held liable for the negligent conduct of an agent acting within the scope of his or her agency. *Adames v. Sheahan*, 233 Ill. 2d 276, 298 (2009). The agent's liability is thereby imputed to the principal and generally the plaintiff need not establish malfeasance on the part of the principal. *Vancura v. Katris*, 238 Ill. 2d 352, 375 (2010). Plaintiff's complaint here alleged that PKA Corp. and PKA International, "through its agents and employees encouraged local chapters, including Eta Nu, to hold events similar to 'Mom and Dad's Night' because they were good for member and pledge retention." However, the complaint also alleged that PKA Corp. and PKA International established a hazing policy precluding a "chapter, colony, student or alumnus" from conducting or condoning hazing activities defined as "[a]ny action taken or situation created,

intentionally, whether on or off fraternity premises, to produce mental or physical discomfort, embarrassment, harassment, or ridicule." The policy also stated that hazing activities may include, but are not limited to, the use of alcohol. Plaintiff alleged that David's death resulted from his participation in a pledging event in which agents of PKA Corp. and PKA International, the officers and pledge board members of the Eta Nu chapter of the fraternity, required pledges to consume excessive amounts of alcohol to the point of intoxication. PKA Corp. and PKA International's hazing policy, however, explicitly states that it does not condone such activity thus placing their agents' actions outside the scope of their agency. Therefore, plaintiff's complaint does not state a sufficient claim for vicarious liability in counts I and II and the trial court properly dismissed that claim as to PKA Corp. and PKA International. See *Adames*, 233 Ill. 2d at 298-99 (conduct of a servant is not within the scope of employment if it is different in kind from what is authorized).

¶ 43 In counts I and II, plaintiff also alleged direct negligence in that PKA Corp. and PKA International permitted and allowed dangerous pledge events at their local chapters, failed to warn their local chapters about the dangers or risks of requiring the consumption of excessive amounts of alcohol, failed to develop reasonable and effective policies to prevent such dangerous events, and failed to ensure that their local chapters followed policies and procedures regarding proper initiation procedures. Unlike liability based on a theory of *respondeat superior*, a claim of direct negligence requires malfeasance on the part of the principal itself. However, in order to state a cause of action in negligence, plaintiff must establish that defendants owed a duty to David. *McLane v. Russell*, 131 Ill. 2d 509, 514 (1989).

¶ 44 To find such a duty, plaintiff and defendant must stand in such a relationship to one another that the law imposes upon the defendant an obligation of reasonable conduct for the

benefit of plaintiff. *Id.* at 514-15. The mere allegation of a duty is insufficient; instead, the complaint must allege facts from which the law will raise a duty. *Woodson v. North Chicago Community School District No. 64*, 187 Ill. App. 3d 168, 172 (1989). The absence of factual allegations supporting plaintiff's duty claim justifies dismissal of his pleading. *Rabel v. Illinois Wesleyan University*, 161 Ill. App. 3d 348, 356 (1987).

¶ 45 In the complaint, plaintiff alleged that PKA Corp. and PKA International "owed plaintiff's decedent a duty to prevent the foreseeable consequences of required excessive consumption of alcohol during initiation ritual, including death." Foreseeability, however, is only one factor in determining the existence of a duty. *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 473 (1991). This determination should also take into account the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on defendant. *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 526 (1987). Plaintiff did not allege any of the other elements in determining duty.

¶ 46 Plaintiff also alleged that PKA Corp. and PKA International engaged in the business of recruiting membership into its organizations, encouraged the local chapters to conduct Greek night events, and required pledges and members to adhere to "the fraternity Constitution, Risk Assessment Manual Chapter Codes and its quarterly publication *The Shield and Diamond* and *The Garnet and Gold* pledge manual." Plaintiff alleged that PKA Corp. and PKA International had the authority to "ban and prohibit pledging activities outright," subjected local chapters to annual week-long assessments, and "had the right and the power to expel, suspend or place restrictive remedial conditions" on local chapters and individual members. However, these allegations are insufficient to create a relationship that imposes upon PKA Corp. and PKA International a duty to protect David, as well as the pledges of all their chapters nationally and

internationally, from the harm he suffered. The test of agency is whether the principal has the right to control the manner and method in which the agent carries out its duties. *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 443 (1992). Citing to the principal's bylaws, rules or regulations is insufficient to establish control unless they show direct supervisory authority over how the agent accomplishes its tasks. *Id.* at 444. Plaintiff's complaint did not allege that PKA Corp. or PKA International had the right to control the activities local chapters and their members used during the pledging process.

¶ 47 Upon consideration of the other elements of duty, we find that imposition of such a duty when PKA Corp. and PKA International are not alleged to have knowledge of or ability to control the day-to-day activities of their members or pledges, would present an unrealistic burden. See *Rabel*, 161 Ill. App. 3d at 360-61. Therefore, plaintiff has not alleged sufficient facts to support the duty allegations. Without a sufficient allegation of duty, plaintiff cannot state a legally sufficient claim for negligence. We affirm the trial court's dismissal of counts I and II against defendants PKA Corp. and PKA International.

¶ 48 In counts IX and X, plaintiff alleged that the named nonmember sorority women who participated in Mom and Dad's Night owed David a duty of reasonable care not to subject him to the excessive consumption of alcohol. However, plaintiff does not allege how, as nonmembers of the fraternity, these women could have required David to drink to intoxication in order to become a member of the fraternity. See *Quinn*, 155 Ill. App. 3d at 237-38. They had no authority to determine who would become members of an organization in which they did not belong. There is no language in *Haben* or *Quinn* that would extend such a duty of care to nonmembers of an organization who participate in the event, and we decline to do so here.

Therefore, we affirm the trial court's dismissal of plaintiff's claim against nonmembers of the fraternity (counts IX and X).

¶ 49 Finally, counts XI and XII allege a negligence claim against the landlord of the premises where the event occurred, Pike Alum. The complaint alleged that Pike Alum leased the premises to the Eta Nu chapter when it knew the tenant was conducting dangerous events such as Mom and Dad's Night thereon, it failed to contact the university or law enforcement to alert them to the dangerous activity, and attempted to prevent such activities from taking place "but did so ineffectively." Generally, under Illinois law no duty exists requiring a landowner to protect a person from the criminal actions of a third party unless the criminal conduct was reasonably foreseeable and a special relationship exists between the injured party and the defendant. *Leonardi v. Bradley University*, 253 Ill. App. 3d 685, 689-90 (1993). Special relationships include: common carrier and passenger; innkeeper and guest; business invitor and invitee; or voluntary custodian and protectee. *Geimer v. Chicago Park District*, 272 Ill. App. 3d 629, 632-33 (1995). Plaintiff's complaint did not allege a legally-recognized special relationship between David and Pike Alum.

¶ 50 Nor does the complaint allege that Pike Alum retained control of the premises so as to trigger a duty. Under Illinois law, a landlord is not liable for injuries caused by a dangerous condition on the premises leased to a tenant and under the tenant's control. *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 413 (1991). Plaintiff asks that we find a duty based upon Pike Alum's alleged knowledge that dangerous events such as Mom and Dad's Night were taking place on the premises, citing a case from another jurisdiction as support (*Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 680 N.Y.S.2d 277 (N.Y. App. Div. 1998)). However, even if this court were to follow a case which has no precedential authority here, plaintiff's complaint alleged

insufficient facts to support his negligence claim. Plaintiff's allegations merely concluded that Pike Alum knew of dangerous events taking place at the fraternity because it is an alumnus of PKA, from reading and receiving reports in newsletters and email alerts, and receiving updates on disciplinary actions taken against Eta Nu and other chapters nationwide. Plaintiff did not allege facts supporting these conclusory allegations. Since plaintiff did not allege a special relationship creating a duty owed by Pike Alum, the trial court properly dismissed plaintiff's claims against Pike Alum (counts XI and XII).

¶ 51 For the foregoing reasons, the judgment of the circuit court is affirmed as to counts I, II, IX, X, XI, and XII. We reverse the trial court's dismissal of counts III, IV, V, VI, VII, and VIII, and remand for further proceedings.

¶ 52 Affirmed in part; reversed in part. Remanded for further proceedings.

¶ 53 JUSTICE CONNORS, specially concurring:

¶ 54 Although the majority and I reach the same conclusion, I find it necessary to write separately to address and attempt to clarify the apparent state of confusion regarding how a plaintiff satisfies the requirements of bringing a cause of action under the Hazing Act. Specifically, I depart from the majority in order to further explain the narrowly tailored duty recognized by the courts in *Quinn* and *Haben*. To be clear, I agree with the majority's analysis of the duty under the Hazing Act as applied to PKA Corp. and PKA International, the nonmember defendants, and premises owner defendants. I also agree with the majority's analysis regarding the plaintiff's satisfaction of the pleading requirements for a negligence claim based on voluntary undertaking, and therefore do not write separately on those issues. Thus, the purpose of this concurrence is to concentrate on the limited issue of addressing and analyzing the duty

requirement in a negligence action brought under the Hazing Act against individual members of a fraternity or similar organization, and the local chapter of said organization.

¶ 55 The primary question before this court, as it was in *Quinn*, is whether the local fraternity chapter defendant, Eta Nu chapter of PKA, owed a common law duty to plaintiff to refrain from requiring participation in hazing acts. As the majority suggests, a reviewing court must determine whether plaintiff's complaint comports with the following two essential factors: (1) that plaintiff was required to drink to intoxication in order to join the fraternity, and (2) the legislature has enacted a statute against hazing. *Quinn*, 155 Ill. App. 3d at 237-38. In my opinion, plaintiff's complaint clearly satisfies these two requirements. His complaint alleges that "attendance and participation [at Mom and Dad's night] was a mandatory prerequisite to active membership in the fraternity and that [pledges] would be required to drink excessive amounts of alcohol during the event." The Hazing Act is still in force and effect, thus, the legislature has evidenced its intent to discourage hazing conduct.

¶ 56 Looking to the duty analysis in *Quinn*, I call attention to a section of the *Quinn* court's examination that the majority here did not examine in great detail, but which I find necessary to explain the existence of a duty under the Hazing Act. *Supra* ¶ 23. Specifically, I write separately to address the additional steps I believe a reviewing court must complete in order to determine whether the duty created by the Hazing Act forms the basis for a common law negligence action in a particular case. The *Quinn* court looked to the factors outlined in *Lance v. Senior*, 36 Ill. 2d 516, 518 (1967), to help determine whether a duty should be placed on the defendant. The *Lance* factors are: (1) the foreseeability of the occurrence, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against it, and (4) the consequences of placing that burden on defendant. *Id.* I believe it is essential for this court and future reviewing courts to

determine on a case-by-case basis whether the facts before it satisfy the *Lance* factors, and thus give rise to a duty. It is not enough to merely look to the two *Quinn* factors when faced with a case brought under the Hazing Act.

¶ 57 I believe this case satisfies all four of the *Lance* factors, but I also believe there are cases that may purport to allege a cause of action under the Hazing Act that would not satisfy the requisite factors, which is why a careful examination of each factor is crucial. Looking to the first *Lance* factor, it was certainly foreseeable that plaintiff and other pledges would become harmfully intoxicated. Plaintiff's complaint alleges that at Mom and Dad's night, the pledges were each given four-ounce plastic cups that were repeatedly filled with vodka in each room the pledges visited. Each pledge was then required to drink the vodka after answering "nonsensical" questions from the pledge board members and female nonmembers. If pledges manifested an unwillingness to drink, they were called "pussies" and "bitches" until they assented. The complaint further alleged that plaintiff's decedent, David, had consumed three to five cups of vodka in each of the seven rooms he visited. This equates to a total of a minimum of 21 cups of vodka. Even assuming, *arguendo*, that each cup only had one ounce of vodka in it, that would still mean that David ingested 21 ounces of vodka in 1 ½ hours. It is clearly foreseeable that requiring a person to consume 21 ounces of vodka in 1 ½ hours could result in harm and even death. In fact, according to plaintiff's complaint, defendant pledge board members knew that it was likely that the pledges would drink to vomit-inducing intoxication, because when the pledges were taken to the house basement once "they were no longer able to walk on their own," they were given buckets that had been decorated by the female nonmember defendants. If defendant pledge board members could not foresee that vomit-inducing intoxication levels were likely to result from

their conduct of forced alcohol ingestion, then it begs the question—for what other purpose were the decorated buckets provided?

¶ 58 Further, plaintiff's complaint alleges that "[David] was placed in a bed in his Greek father's room by active member Gregory Petryka who tried to orient his head and body so that if he vomited, he would not choke on it," thus the pledge board members foresaw that the pledges would be so intoxicated that they may even vomit in their sleep, which could cause asphyxiation. In their response brief, the Eta Nu chapter of PKA, PKA Corp., and PKA International stated "the allegations [of plaintiff's complaint] reveal a social drinking party for the pledges in which a few pledges jumped at the chance to overconsume and others were more judicious and other declined." Based on the allegations of plaintiff's complaint, this statement by the Eta Nu chapter of PKA, PKA Corp., and PKA International is a gross mischaracterization of the events in question. Contrary to their contention that a few pledges took it upon themselves to consume alcohol in dangerous and even fatal levels, I believe the foreseeability of injury was overwhelmingly clear to defendants. Additionally, based on these same alleged facts, plaintiff has also satisfied the second *Lance* factor by showing that injury, and even death, was likely.

¶ 59 Turning to the third *Lance* factor, I believe plaintiff has shown that the magnitude in guarding against the injury he suffered was minimal, if not completely avoidable. Simply put, there is no reasonable interest served in engaging in the conduct that is at issue in this case. Requiring teenagers, whether they are minors in the eyes of the law or not, or anyone for that matter, to ingest alcohol to the point of, at a minimum, vomiting on themselves does not further any public policy interest, thus I see no reason to protect such behavior in this case. The burden of guarding against this type of conduct is minimal and I believe our legislature has evidenced its frustration with hazing-related incidents and injuries by enacting the Hazing Act.

¶ 60 Plaintiff has satisfied the fourth *Lance* factor by showing that the burden of placing the consequences on defendant is appropriate. The conduct at issue here that resulted in David's death was squarely within the control of the defendants. That is not to say that ultimately a fact finder may determine their percentage of fault to be less than 100%. As the court in *Quinn* noted, "[t]o the extent that plaintiff acted willingly, liability can be transferred to him under principles of comparative negligence." *Quinn*, 155 Ill. App. 3d at 237. The defendant pledge board members and the Eta Nu chapter of PKA are the proper parties to bear the consequences for the conduct that caused plaintiff's injuries.

¶ 61 I also want to emphasize the *Quinn* court's recognition that the mere providing of alcohol was not what gave rise to a common law duty. *Quinn*, 155 Ill. App. 3d at 237. Rather, the facts of that case involved something more, namely "that the abuse illustrated *** could have resulted in the termination of life and that plaintiff was coerced into being his own executioner." *Id.* The situation that the *Quinn* court foresaw almost eerily mirrors the factual scenario alleged in this case. Here, David was forced to consume alcohol, and as a result, his life was terminated.

¶ 62 Additionally, I write separately to expound on the majority's mention of *Quinn*'s acknowledgement that our supreme court has recognized: The violation of a statute or ordinance "designed for the protection of human life or property is *prima facie* evidence of negligence" (Internal quotation marks omitted.) *Supra* ¶ 24 (quoting *Quinn*, 155 Ill. App. 3d at 238). Although not addressed by the majority here, the court in *Quinn* further stated: "In order to sustain such a cause of action, two conditions must be met: first, the plaintiff must be within the class of persons the ordinance was designed to protect; and second, the plaintiff must have suffered the type of harm the statute was designed to prevent." (Internal quotation marks omitted.) *Quinn*,

155 Ill. App. 3d at 238. Therefore, unlike the majority, I believe reviewing courts must also determine whether these two conditions are met on a case-by-case basis.

¶ 63 Here, the statute under which plaintiff brings his cause of action is the Hazing Act, which reads,

> "A person commits hazing who knowingly requires the performance of any act by a student or other person in a school, college, university, or other educational institution of this [s]tate, for the purpose of induction or admission into any group, organization, or society associated or connected with that institution if:
>
> (a) the act is not sanctioned or authorized by that educational institution; and
>
> (b) the act results in bodily harm to any person." 720 ILCS 12C-50 (West 2012).

¶ 64 It is clear that plaintiff is within the type of persons that the Hazing Act was enacted to protect. David was a college student who wanted to join a fraternity associated with NIU. Plaintiff's complaint alleges specific facts that show that the alleged hazing acts at issue, *i.e.* forcing David to drink alcohol until dangerously intoxicated, was not sanctioned by the institution, and that said conduct resulted in the ultimate harm to plaintiff, his death. Additionally, plaintiff's complaint alleged that, contrary to NIU's policies, "Mom and Dad's Night" had not been sanctioned with NIU.

¶ 65 Plaintiff has satisfied *Quinn*'s narrowly tailored Hazing Act factors by alleging sufficient facts to show that plaintiff was required to drink to intoxication and that the legislature enacted a statute against hazing. Additionally, plaintiff has adequately pled a duty, and ultimately a cause of action, under the Hazing Act by alleging sufficient facts to satisfy the four *Lance* factors. Finally, it is essential that plaintiff was the type of person the Hazing Act was meant to protect, and that he suffered the type of harm that the Hazing Act was designed to prevent. I believe it is the

combination of these pleading requirements that allow a plaintiff to adequately set forth the requisite duty element for a common law negligence cause of action brought pursuant to the Hazing Act.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

GARY L. BOGENBERGER, as Special Administrator of the Estate of DAVID R. BOGENBERGER,	)	
Plaintiff,	)	
v.	)	13 L 1616
PI KAPPA ALPHA CORPORATION, et. al.,	)	
Defendants.	)	

AMENDED [1]
MEMORANDUM OPINION AND ORDER ON DEFENDANTS' 2-615 MOTIONS TO DISMISS FIFTH AMENDED COMPLAINT [2]

I. FACTUAL BACKGROUND

The Plaintiff filed a twelve-count Fourth Amended Complaint against the Defendants arising out of the alcohol-related death of the Decedent at a college fraternity pledging activity known as "Mom and Dad's Night," on November 1, 2012. It is alleged that the Decedent, a pledge at the fraternity, was given excessive amounts of alcohol, became unconscious, was left on a bed, and then died. Counts I and II are directed at Defendants Pi

[1] The Amended Memorandum Opinion was issued to include the name of Patrick W. Merrill, as a individual defendant and officer of Eta Nu Chapter with regard to Counts III and IV, inadvertently omitted from the Original Memorandum Opinion, who had joined in the motions to dismiss of the other officers and pledge board members, and Russell Coyner, as an individual member of the fraternity, and who was included in the members' motion to dismiss.

[2] The Plaintiff filed a Fifth Complaint, on May 28, 2014, adding Defendants Karissa Azarela, Megan Ledone, Nichole Manfredini, Jillian Merrill and Monica Skowron, but the substantive allegations against all other defendants remained the same, and the motions to dismiss filed with regard to the Fourth Amended Complaint would stand as to the Fifth Amended Complaint.

Kappa Alpha Corporation (PKA) and Pi Kappa Alpha International Fraternity, counts III and IV are directed at Eta Nu Chapter of Pi Kappa Alpha International Fraternity at Northern Illinois University (EU), Pi Kappa Alpha Corporation (PKA), Pi Kappa Alpha International Fraternity, and seven officers or pledge board members, counts V and VI are directed at the seven officers and pledge board members individually, counts VII and VIII are directed at 21 named active members of fraternity, counts IX and X are directed at 16 non-member female students who participated in the fraternity event, and counts XI and XII are directed at Pike Alum, LLC, the owner of the premises where the fraternity was located. All of the claims sound in negligence and are brought pursuant to the Wrongful Death Act and the Survival Act.

2-615 Motions to Dismiss have been filed by Defendant PKA, Defendant EU, Defendants fraternity members Thomas Costello, Kevin Rossetti, Michael Pfest, Nelson Irizarry, Michael Phillip, Jr., David Sailer, Alexander Renn, Estefan A. Diaz, Hazel Vergaralope, Isaiah Lott, Andrew Boulanu, Daniel Post, John Wallace, Thomas Bralis, Andres Jiminez, Nicholas Sutor, Nsenzi Salasini, Russell P. Coyne,[3] and Greg Petryka, (with Greg Petryka filing a separate motion), Defendants fraternity officers Alexander Jandlek, James P. Harvey, Patrick W. Merrill, [4] Omar Salameh, Steven Libert, John Hutchinson, and Daniel Blagini, Defendants female fraternity guests/participants Kelly Burback, Lindsey Frank, Janet Luna, Jessica Anders, Tiffany Schweinfurth, Nicole Minik, Alyssia Allegretti,

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[3] See Footnote 1, *supra*.

[4] See Footnote 1, *supra*.

Prudence Willrett, Logan Redfield, Kristianna Kinz, Raquel Chavez, Katherine Reporto, Courtney Odenthal, Nicole Manfredini, and Adriana Sotelo, and Defendant Pike Alum.

In all of the motions, the Defendants essentially argue that the Fourth Amended Complaint continues to fail to allege a duty in light of the case law which prohibits social host liability with regard to alcohol. They again point out that the Quinn and Haben cases have been rebuked and that even if their holdings survive, the allegations here do not fit into the narrow exception of liability carved out by those cases and do not fit within the Anti-Hazing statute. Further, the Defendants contend that the pleading again fails to allege facts to impose a duty with regard to a voluntary undertaking, concerted action, or joint liability.

In addition, the female students who participated in the subject event add that as they did not belong to the fraternity, even if the Quinn/Haben exception applied, it would not apply to them. They note that as it was only alleged that they were in the room, they owed no duty with respect to the provision of alcohol.

With regard specifically to Defendant Pike Alum, it adds that as it was only the landlord, it cannot be liable for the acts of the tenants which it did not know of, noting that there are no facts pled evincing any knowledge.

The Plaintiff has filed a combined response to the motions. The Plaintiff maintains that the pleading is sufficiently specific to state a cause of action against all of the Defendants. He continues to argue that Quinn and Haben are viable and remain the law, and that he has properly alleged claims in accordance with the dictates of those cases. He also maintains that he has properly alleged concerted action in a common scheme or plan, as well as a duty pursuant to a voluntary undertaking.

As to the female student participants, the Plaintiff contends that the anti-hazing statute applies to everyone, and thus, they owed a duty under the Quinn/Haben exception. With regard to Defendant Pike, the Plaintiff contends that as the tenants acts were foreseeable, the landlord is liable.

Most of the Defendants, either in the replies or in a separate motion, have moved to strike the Plaintiff's reference in the response to an unpublished Rule 23 appellate order as it is improper. They also move to strike the Plaintiff's reference to various articles and citations outside the four corners of the complaint.

The Court has read the motions, response, and replies.

II. COURT'S DISCUSSION AND RULING

While the Court has made the same points in all of the prior rulings on all of the previous incarnations of the Plaintiff's complaint, it will again review the applicable law. In Quinn v. Sigma Rho, 155 Ill. App.3d 231 (4th Dist., 1987), where a fraternity pledge suffered neurological damage as a result of the excessive consumption of alcohol during an initiation ceremony, the court held that a complaint stated a cause of action based on the fact that the plaintiff was *required* to drink to intoxication in order to become a member of the fraternity and the fact that the fraternity's conduct violated the hazing statute. Quinn., at 238. In a similar situation with regard to a university Lacrosse Club, the court in Haben v. Anderson, 232 Ill. App.3d 260 (3rd Dist., 1992), followed the rationale in Quinn and found that a complaint was sufficient where the drinking was a requirement of membership to the club. Haben, at 263.

However, after Quinn and Haben, the Illinois Supreme Court, in the case of Charles

v. Seigfried, 165 Ill.2d 482, 504 (1995), declined to create *any* form of social host liability. Charles, at 504. While the court in Charles did not specifically overrule these cases, the breadth and scope of the Charles ruling appears to have abrogated their holdings. Further, in the Wakulich case, the Illinois Supreme Court specifically questioned the continued validity of Quinn and recognized that the ruling and rationale in both Quinn and Haben would apply only in *exceptionally* narrow circumstances, where a college fraternity or organization requires those seeking membership to engage in illegal and dangerous activities in violation of the anti-hazing statute. Wakulich v. Mraz, 203 Ill.2d 223, 239-240 (2003).
And, prior to the case being affirmed by the Illinois Supreme Court, the First District Appellate court in Wakulich, stated that the Quinn exception did not survive Charles. Wakulich v. Mraz, 332 Ill. App.3d 768, 773 (1st Dist., 2001). Thus, despite the Plaintiff's protestations to the contrary and his attempts ascribe a broader applicability to Quinn, a claim under the Quinn exception is questionable, at best.

Moreover, to the extent that it remains possible to state a cause of action where a student was required to consume alcohol to intoxication as a prerequisite for membership in a fraternity or university organization, the pleading must contain specific, relevant factual allegations which are capable of setting forth that narrow exception.

In the Fourth Amended Complaint, despite a few additional allegations, the Plaintiff has again failed to set forth sufficient facts to allege a duty under the Quinn exception to social host liability. The Plaintiff's allegations continue to be conclusory and do not plead facts which show that the fraternity *required* intoxication as a prerequisite for membership in violation of the anti-hazing statute. In the instant pleading, it is merely alleged that "on

information and belief" the Decedent "believed" that participation in the activity and excessive drinking were required for membership.

Also, it is merely alleged that the plan to have pledges drink excessively was made by "unknown" fraternity members. These are not the specific, factual allegations necessary to show that the fraternity required those seeking membership to engage in illegal and dangerous activities in accordance with the Quinn decision. Furthermore, the allegations with respect to any voluntary undertaking *vis-a-vis* caring for the Decedent when he became unconscious, continue to be deficient.

Similarly, the allegations of concerted action or joint liability also continue to be lacking in factual specificity, as are the allegations which attempt to plead the existence of a conspiracy.

With regard to all of the individual Defendants, fraternity officers, members, and student participants, the Plaintiff still does not allege with particularity the facts showing which individual or individuals committed any acts, either indicative of taking control over the Decedent, or showing the concoction of a scheme or plan, or illustrating how they acted in concert pursuant to such a scheme or plan.

While the Plaintiff now alleges that fraternity member Gregory Petryka put the Decedent in the bedroom and tried to orient his head to prevent him from choking on vomit if he vomited, there are no facts pled which show that Petryka took affirmative action and assumed exclusive control of the Decedent which put him in a worse position. Thus,

there is no duty based on a voluntary undertaking against Gregory Petryka. [5]

In addition, with regard to the non-member female participants in the incident in counts IX and X, as the Court previously noted, even assuming that the Quinn exception was viable and applicable to this case, it would not apply to those Defendants as they were not members of the fraternity. There is also nothing in the anti-hazing statute when read as a whole which would support its extension to non-members of an organization. In any event, even if it did, the Fourth Amended Complaint again lacks the facts necessary to support an exception to social host liability, voluntary undertaking, or concerted action/joint liability, with regard to these Defendants.

Finally, with regard to Defendant Pike Alum, there are no factual allegations which would impose a duty on it as a landlord with regard to the actions of its tenant, the fraternity. There are no specific facts pled which support the bare conclusory allegation that it had knowledge of the fraternity's dangerous and illegal activities at "Mom and Dad's Night," nor are there any other factual allegations which provide support for the bare allegation of duty on the part of Pike Alum. Additionally, in light of the deficiencies with respect to social host liability, voluntary undertaking, and joint liability, no such claim has been stated against Pike Alum.

The Plaintiff has had five opportunities to state a claim here and in light of the applicable law, it does not appear likely that the Plaintiff will be able to properly state a cause of action against these Defendants. Therefore, based on the foregoing, the Defendants' 2-

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[5] The Court also amended this page of the Memorandum Opinion to separate the ruling *vis-a-vis* Gregory Petryka, as he had filed a separate motion to dismiss.

615 Motions to Dismiss are granted with prejudice against all Defendants [6] and with no further leave to replead.

This Amended Memorandum Opinion and Order is entered *nunc pro tunc* to December 11, 2014.

ENTER:

E N T E R

DEC 1 2 2014

KATHY M. FLANAGAN #267

Judge Kathy M. Flanagan

[6] This phrase was added to include all Defendants in this Court's ruling, regardless if they filed a motion or merely joined in another defendant's motion.

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