

No. 120986  
(Consolidated with Nos. 120951 and 120967)

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In the  
**Supreme Court of Illinois**

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GARY L. BOGENBERGER, as special administrator of the  
Estate of David Bogenberger, deceased,

*Plaintiff-Appellee,*

v.

ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL  
FRATERNITY AT NORTHERN ILLINOIS, an unincorporated association,

*Defendant-Appellant,*

**(CAPTION CONTINUED ON INSIDE COVER)**

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On Appeal from the Illinois Appellate Court of Illinois,  
First Judicial District, 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.

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**BRIEF OF APPELLANT ETA NU CHAPTER OF PI KAPPA ALPHA  
INTERNATIONAL FRATERNITY AT NORTHERN  
ILLINOIS UNIVERSITY**

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**ORAL ARGUMENT REQUESTED**

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and

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*Defendants.*

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## **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 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 include the national fraternity organization, its local chapter, seven officers of the local chapter, 20 fraternity members, 21 nonmembers, and the landlord.

Plaintiff alleged that David Bogenberger, a fraternity pledge, died after he drank excessive amounts of alcohol during the event. 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 20 members of the fraternity; counts IX and X were directed at 21 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.*) and the Survival Act (735 ILCS 5/27-6).

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) and that they also assumed a voluntary undertaking to care for unconscious pledges, including decedent.

The court further determined that the fifth amended complaint stated a claim that the officers and members of the Eta Nu chapter were acting within the scope of their authority in planning and executing the event, and therefore reversed the dismissal of the counts against the local chapter.

The question raised is on the pleadings.

## **Issues Presented for Review**

1. This court has repeatedly and categorically determined that the General Assembly alone sets the parameters for alcohol-related liability under Illinois law. The appellate court carved out an exception to the rule when the injuries did not arise from a “social host’s” sale or gift of alcohol. Does the “so-called exception” to the rule against social host liability for alcohol-related injuries incurred during a college fraternity’s pledging activity violate this court’s uniform case law?

2. Under a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking. Plaintiff does not plead that any fraternity member took complete and exclusive control of David Bogenberger after he became unconscious, or that any member’s actions increased the risk of harm to David; or that the post-event conversations among members were within the scope of planning the activity. Does the fifth amended complaint adequately state a claim for the Chapter to be vicariously liable for a voluntary undertaking?



### Statement of Jurisdiction

Plaintiff appealed from the final order dismissing his action with prejudice, pursuant to Illinois Supreme Court Rules 301 and 303. 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. The appellant Chapter thereafter obtained an extension of time in which to file its Rule 315 petition for leave to appeal which it timely filed on July 29, 2016.

## **Statute Involved**

### **720 ILCS 5/12C-50. 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**

### **A. Allegations regarding David Bogenberger's death.**

#### **1. Discovery preceding the fifth amended complaint.**

On February 14, 2013, the plaintiff, Gary Bogenberger, as special administrator of the estate of David Bogenberger, deceased, filed his original four-count complaint seeking to recover for the wrongful death of his son pursuant to the Wrongful Death Act (740 ILCS 180-1) and the Survival Act (735 ILCS 5/27-6). *R.C0003*. The claims arose from David Bogenberger's alcohol-related death following a pledge activity at the Pi Kappa Alpha fraternity house at Northern Illinois University in DeKalb, Illinois.

The complaint named the national fraternity Pi Kappa Alpha Fraternity ("Fraternity"); the local Eta Nu chapter ("Chapter"); five officers of the Chapter; and 17 Chapter members.

On February 19, 2013, the 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.C0023*. Plaintiff received over a thousand pages of investigative records and related documents, including summaries of 43 statements given

to police by 25 fraternity members, 16 pledges and two non-members guests at the activity; and video and audio interviews of most defendants in this action. After reviewing the criminal investigation reports and witness statements, Plaintiff filed a ten-count First Amended Complaint which added four Chapter members and sixteen female non-members *R.C200-33*.

Thereafter, the circuit court issued opinions granting successive 2-615 motions to dismiss, dismissing all counts in the first and third amended complaints.<sup>1</sup> *R.C954; R.C1948*. Plaintiff conducted further discovery before the fourth amended complaint was filed, receiving interrogatory answers and documents from the Fraternity defendants; and conducted a deposition of Justin Buck, the Fraternity's chief executive officer, before the plaintiff filed his fourth amended complaint *R.C2167, R.C2171-72*.

Plaintiff's fourth amended complaint was then superseded by the fifth amended complaint, whose allegations are at issue here.

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<sup>1</sup> Plaintiff obtained leave to file the third amended complaint before the motions to dismiss the second amended complaint were heard. The third amended complaint added the chapter house's landlord Pike Alum, LLC, and the administrative corporation for the national fraternity, Pi Kappa Alpha Corporation. *R.C1650*.

**2. The pledging activity alleged in the fifth amended complaint.**

The fifth amended complaint alleges that David Bogenberger was a pledge to the Pi Kappa Alpha fraternity chapter at Northern Illinois University. On November 1, 2012, he was served and drank a substantial amount of vodka during a “pledging activity” known as “Mom’s and Dad’s Night.” The event had been planned by fraternity officers and members of the pledge board on several nights beforehand. R.C3032.

The complaint alleges “Mom & Dad’s Night” is a common fraternity pledging activity at fraternities around the country, and that “unknown employees” of the national Fraternity told the Chapter officers and members that the event is “good for pledge and member retention, and encouraged the officers and members of the Chapter to hold such an event. R.C3032. The complaint alleges attendance and participation was a “mandatory prerequisite to active membership in the fraternity.” R.C3033.

The plan was for the pledges to rotate from room to room in the fraternity house, where they would be asked questions by fraternity members and collegiate women (*i.e.*, the “Greek Mothers”) and drink alcohol, regardless of the answers given. R.C3033, 3035. The pledges were then led to the basement where they were told the identity of their Greek parents; and were

given customized t-shirts, paddles and buckets, decorated by the women participants, into which they could vomit. R.C3036.

The pledges were then placed in a designated area in the house and in a manner to avoid each pledge from choking on his vomit; they would then be checked periodically. R.C3033-3036. In particular, David was placed in a bed in his Greek father's room, where his head and body were likewise oriented to avoid choking on his vomit, should he do so. R.C3036.

Plaintiff qualified many allegations with the phrase "on information and belief" despite having two rounds of investigation and discovery available to him. R.C3032-3037. The complaint identifies Gregory Petryka as the chapter member who placed the decedent in the bed; and Alexander Jandick, who was the president of the Chapter, and Patrick W. Merrill, a Chapter officer, as the senders of a mass text directing party-attendees to delete photos or videos from the evening. R.C3036.

Counts I and II of the fifth amended complaint are directed at defendants Pi Kappa Alpha Corporation and Pi Kappa International Fraternity (the "Fraternity"). R.C3037-3051. Counts III and IV are directed at Eta Nu Chapter of Pi Kappa Alpha International Fraternity at Northern Illinois University (the "Chapter"), Pi Kappa Alpha Corporation, Pi Kappa Alpha International Fraternity and seven Chapter officers or pledge board

members, acting in their official capacity as officers and board members. R.C3051-3062. Counts V and VI are directed at the same seven Chapter officers or pledge board members individually. R.C3062-3070. Counts VII and VIII are directed at 21 members of the Chapter R.C3062-3070. Counts IX and X are directed at 16 non-member female students who participated in the Mom & Dad Night. R.C3079-3088. Finally, counts XI and XII are directed at Pike Alum, L.L.C., the chapter house premises owner, R.C3088-3094.

Counts III-X reference the Illinois hazing statute, 720 ILCS 120/5.

**B. The circuit court dismisses the fifth amended complaint.**

On December 11, 2014, Judge Kathy Flanagan granted the defendants' section 2-615 motions to dismiss the fifth amended complaint in a memorandum opinion and order. R.C3444-50. The court amended its memorandum opinion and order to include the dismissal of two individual defendants on December 12, 2014, *nunc pro tunc* to December 11, 2014. R.C3451-58.

The opinion concludes that the narrow exception to social host non-liability found in *Quinn* and *Haben* "is questionable at best" in light of this

court's more recent *Charles* and *Wakulich* decisions.<sup>2</sup> R.C3455. Plaintiff's inability to plead a tort cause of action alone warranted dismissal.

The circuit court continued, however, that even assuming *arguendo* that a cause of action could be stated within the narrow exception, the fifth amended complaint was conclusory and failed to allege facts which established that the Fraternity required intoxication as a prerequisite for membership in violation of Illinois' anti-hazing statute. R.C3455. Plaintiff alleged only that the decedent believed that participation and excessive drinking were required for membership. R.C3455-56

The circuit court also determined that the pleading lacked specific allegations of well-pled facts about the plan by unknown Chapter members requiring pledges to engage in dangerous and illegal activities as a prerequisite of fraternity membership; and their voluntary undertakings, joint liability and concerted action. R.C3456. The court read the complaint as deficient by not identifying the individual defendants, Chapter officers, members and students who committed any acts, either indicative of taking

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<sup>2</sup> *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 155 Ill.App.3d 231 (1987); *Haben v. Anderson*, 232 Ill.App.3d 260 (1992); *Charles v. Seigfried*, 165 Ill.2d 482 (1995); *Wakulich v. Mraz*, 203 Ill.2d 223 (2003).



control over the 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*.

Plaintiff did not allege any facts that showed that the one chapter member he did identify by name, Gregory Petryka, took affirmative action and control which put the decedent in a worse position as needed to support a cause of action based on Petryka's alleged voluntary undertaking. *R.C3456-57*. The court also concluded that plaintiff pled no facts as to the defendant landlord, Pike Alum, L.L.C., giving rise to a duty with regard to the actions of the tenant Chapter, and that no claim had been stated against the landlord. *R.C3457*.

Because after six opportunities plaintiff had still failed to state a cause of action against the defendants, and in light of the law against social host alcohol liability, the circuit court granted all motions to dismiss without giving the plaintiff leave to replead further. *R.C3457-58*.

### **C. The appellate court reverses the dismissal.**

On June 13, 2016, the appellate court affirmed in part, reversed in part, and remanded the case for further proceedings. *Bogenberger v. Pi Kappa Alpha Corp., Inc., et al.*, 2016 IL App (1<sup>st</sup>) 150128.

The panel's opinion provides a lengthy review of Illinois statutory and common law regarding alcohol-related liability. The opinion discusses this

court's decisions in *Cruse*<sup>3</sup>, *Charles* and *Wakulich*, noting the "broad holding" that no social host liability exists for alcohol-related injuries. ¶17. The court quoted *Charles*' specific holding that "no common law cause of action for injuries out of the sale or gift of alcoholic beverages" exists. ¶19.

Nevertheless, the appellate court accepted plaintiff's argument that this is not a social host case, and that this action "is more in line with" *Quinn* and *Haben*. That is, that *Quinn* "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." ¶23.

The panel resolved that plaintiff's claim stems from a "fraternity function where plaintiff was required to drink to intoxication in order to become a member of the fraternity." ¶29. The court agreed with *Quinn* that such a circumstance is distinguishable from the social host circumstances at issue in *Charles* and *Wakulich*, decisions which the panel noted had not included a definition for "social host." ¶¶29, 30.

Having resolved a negligence cause of action could be pled, the court then determined that plaintiff's fifth amended complaint stated a cause of action under the *Quinn* and *Haben* decisions. The court based this decision

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<sup>3</sup> *Cruse v. Alden*, 127 Ill. 231 (1889).

on the alleged criminal violations of the Hazing Act, and that officers and members had also voluntarily assumed a duty to care for the intoxicated and unconscious pledges. ¶¶36-39.

Finally, the panel also held that plaintiff pled a cause of action against the Chapter, 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.” ¶40. The court affirmed, however, the dismissal of the national Fraternity defendants, Pi Kappa Alpha Corp. and Pi Kappa Alpha International, holding the complaint did not allege direct or vicarious liability against them. ¶¶41-47. The court also affirmed the dismissal of counts against the nonmember women defendants and chapter-house landlord. ¶¶48-50.

No party filed a petition for rehearing.

### Standard of Review

A motion to dismiss, pursuant to section 2-615 of the Code of Civil Procedure 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). 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 (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.

## Argument

The appellate court's decisions in *Quinn, Haben*, and this case effectively overturn more than 125 years of this court's consistent opinions 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." *Charles*, 165 Ill.2d at 486.

The 1995 *Charles* opinion specifically affirmed the unvarying resolution 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," and that this court has routinely rejected "all theories of liability," including those based on "certain prohibited sales" within the Liquor Control Act, including illegal sales to minors. *Id.* at 490-91.

When faced with a 2003 plea to overrule *Charles*, this court once again declined to create a common law action for alcohol-related injuries. The *Wakulich* opinion confirms that by virtue of the General Assembly's repeated amendments to the Dramshop Act, without creating the prayed-for tort liabilities thereunder, the General Assembly had "preempted the entire field of alcohol-related liability." 203 Ill.2d at 231.

*Quinn, Haben*, and the appellate court's opinion directly contradict the *Charles* and *Wakulich* holdings.

Furthermore, the appellate court's decision bootstraps alcohol-related civil liability based on alleged criminal violations under the Hazing Act even though the statute provides no private cause of action for civil recovery. This court rejected a nearly identical plea in *Wakulich*, continuing this court's decisive rejections of civil alcohol-related liability rooted in a criminal statute. No authority from this court supports the "so-called exception" to social host liability.

In addition to its improper alcohol-related liability allegations, plaintiff here pleads that fraternity members negligently discharged a voluntarily undertaking to care for the unconscious pledges. The appellate panel mistakenly reversed those allegations' dismissal despite plaintiff's failure to identify which member voluntarily undertook complete and exclusive charge of David's care after he became unconscious. It is impossible to reconcile how as many as 27 members could take complete and exclusive charge of David's care without identifying what each of them allegedly did or did not do relative to the decedent.

Furthermore, the complaint alleges only that unknown fraternity members positioned David so that he would not aspirate vomit, should he vomit. The complaint does not allege that this placement left David in a worse position than he had been in immediately before, or that the

voluntarily-undertaken acts worsened David's condition, or proximately caused his death.

Finally, the appellate court held that through those allegations plaintiff sufficiently pled vicarious liability against the Chapter "since the elected officers and pledge board members ... were acting within the scope of their authority in planning and executing the event." ¶40. But again, the plaintiff's sixth pleading fails to state that claim.

The complaint does not allege that the members' choices to place the pledges around the house or orient them in a certain way were made within the scope of any Chapter authority. Nor does the appellate court opinion explain how an unidentified agent, who in the moment assists an unconscious person, can be acting within the scope of the principal's authority. The post-drinking voluntary decisions by "presently unknown fraternity officers and active members" are not sufficiently alleged to have been undertaken within the scope of Chapter authority.

**A. The appellate court's opinion contravenes this court's repeated pronouncements that there is no common-law cause of action for alcohol-related liability.**

This court has repeatedly and categorically determined that the General Assembly alone sets the parameters for alcohol-related liability under Illinois law. The appellate court's opinion contravenes those pronouncements.

**1. This court has expressed unwavering deference to the General Assembly to control alcohol-related liability.**

Since 1889, when this court reasoned that the Dramshop Act had a "highly penal character, and provides rights of action unknown to the common law," the court has uniformly declined to create a common-law cause of action for alcohol-related liability. *Cruse v. Alden*, 127 Ill. 231, 239 (1889).

For instance, in 1961, the court heard arguments that sought to extend common law liability beyond the Liquor Control Act. And even though the panel acknowledged the prayed-for cause of action expressed plausible public policy, the court nevertheless rejected it in favor of the legislature's enactments; the General Assembly had cornered the alcohol-related liability field. "The plaintiffs' argument has some merit, and if no more were



involved than laying down a new rule of liability it would warrant more serious consideration. But the lack of common-law precedent for such liability” precluded the court’s acceptance of the argument and common law expansion. *Cunningham v. Brown*, 22 Ill.2d 23, 30 (1961).

More recently, this court continued its unwavering and unlimited determination that “the General Assembly has preempted the entire field of alcohol-related liability through its passage and continual amendment of the Dramshop Act.” *Charles v. Seigfried*, 165 Ill.2d 482, 488 (1995). “There is no common law cause of action against *any provider* of alcoholic beverages arising out of the sale or gift of such beverages.” 165 Ill.2d at 486. (*emphasis in original*)

Finally, this court has most recently rejected a plea to overrule *Charles* and recognize a common law negligence cause of action against adult providers of alcohol - even when the adult allegedly violated a criminal statute by providing alcohol to a minor. In *Wakulich v. Mraz*, 203 Ill.2d 223 (2003), this court once again reaffirmed the long-standing legislative preemption for alcohol-related liability as recited in *Charles*, 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.” *See, generally*, 203 Ill.2d at 231-32; *Charles*, 165 Ill.2d at 490.

The *Wakulich* opinion is resolute:

[I]n 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. **Through its passage and continual amendment of the Dramshop Act, the General Assembly has preempted the entire field of alcohol-related liability.**

203 Ill.2d at 231. (citations to *Charles* omitted; emphasis added.)

**2. *Quinn, Haben* and the appellate court's opinion ignore the bases for this court's alcohol-related liability jurisprudence.**

The appellate panel here opted to separate the unequivocal deference to the General Assembly, as confirmed in *Charles* and *Wakulich*, in favor of two older appellate court opinions, *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). In particular, the panel resolved that *Charles* and *Wakulich* were limited to "social host" liability, and that the fraternity here was not a "social host" under the *Quinn* and *Haben* decisions. ¶26; *See also*, ¶29, stating the panel's disagreement "with the defendants' characterization of plaintiff's claim as one based on social host liability."

But this court has never qualified its deference to the General Assembly as dependent on a fact pattern. Instead, the legislature's preemption covers

the “entire field of alcohol-related liability.” *Charles*, 165 Ill.2d at 488; *Wakulich*, 203 Ill.2d at 231. “There is no common law cause of action against *any provider* of alcoholic beverages arising out of the sale or gift of such beverages.” *Charles*, 165 Ill.2d at 486. (*emphasis in original*)

Furthermore, *Wakulich* recognizes that the General Assembly has limited civil liability for alcohol-related injuries to two groups 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. 203 Ill.2d at 236.

The court reasoned that the General Assembly “are best able to resolve such issues comprehensively, taking into account the significant social and economic consequences of any course of action. They are best equipped to determine whether a change in the law is both desirable and workable, and if so, under what circumstances.” 203 Ill.2d at 236.

*Quinn*, *Haben*, and the appellate opinion nevertheless defy *Wakulich*’s recognition of the legislature’s pre-emptive judgment and finality in determining alcohol-related liability causes of action. And although the *Wakulich* opinion itself only distinguished *Quinn* and *Haben* on the facts presented, that is hardly an endorsement of the decisions. Instead, the court properly left, ultimately to this day, whether “the so-called exception to the

rule against social host liability” even exists because *Wakulich* “simply [did] not come within the reach of these two appellate opinions.” 203 Ill.2d at 239.

In light of the *Charles* and *Wakulich* holdings, the appellate opinion here directly conflicts with this court’s consistent refusal to expand alcohol-related civil liability beyond the General Assembly’s enactments. *Charles* and *Wakulich* are not limited to a specific “social host” concept or definition wherein the defendant offers a cocktail party-attendee a drink; certainly neither decision limits its breadth in that manner.

The appellate court cannot reset the entirety of Illinois’s alcohol-related liability common law. The appellate court’s reversal evades more than a hundred years of resolved Illinois law; it must be reversed.

**3. The “so-called exception to the rule against social host liability” cannot be derived from the Hazing Act, which provides purely criminal penalties.**

As noted above, the appellate court here determined that *Quinn* and *Haben* “are factually on point” with this case, thereby differentiating *Charles* and *Wakulich* as “social host” cases. ¶26. The appellate court ignored, however, that even if such factual similarity exists this court has rejected the legal underpinnings of *Quinn* and *Haben*, negating other plaintiff’s similar

arguments and efforts to use a criminal statute to create a common-law theory for alcohol-related civil liability.

**a. The Hazing Act includes no right to civil remedy.**

The parties herein do not disagree that the Hazing Act contains only criminal penalties; it does not provide for a civil cause of action. The statute currently states that a person commits a Class 4 Felony for 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” for the purpose of induction or admission into any group, organization, or society associated or connected with that institution, if the act is not sanctioned or authorized by that educational institution; and the act results in bodily harm to any person. 720 ILCS 5/12C-50.

Furthermore, the General Assembly has periodically amended the Hazing Act, most recently in 1995 – the same year *Charles* was decided. And that amendment was to increase its criminal penalties, emphasizing the bicameral chambers’ attention to the problem of hazing. Yet at the same time, no legislative history reveals or even infers that civil remedies were considered to be part of Illinois’ anti-hazing public policy or even argued to be added to the Act.

Instead, *Quinn, Haben*, and the appellate court's opinion incorrectly conclude that a civil cause of action is implied in the Hazing Act. Those decisions fail to establish the four factors under which a private cause of action may be recognized for violation of a criminal statute.<sup>4</sup>

In particular, none of the cases even discusses how the private cause of action is "necessary to provide an adequate remedy for violations" of the Hazing Act. *Abbasi ex rel. Abbasi v. Paraskevoulas*, 187 Ill.2d 386, 393 (1999).

The *Abbasi* opinion holds that a cause of action may be implied "only where there exists a *clear need* to effectuate the purpose of an act;" this court has also described the factor as established "only in cases where the statute would be ineffective, as a practical matter, unless such an action were implied." *Abbasi*, 187 Ill.2d at 395; *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 464 (1999). Where, as here, the General Assembly's recent

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<sup>4</sup> Implication of a private right of action from statute is appropriate when (1) plaintiff is a member of the class for whose benefit statute was enacted, (2) it is consistent with the underlying purpose of statute, (3) plaintiff's injury is one statute was designed to prevent, and (4) it is necessary to provide an adequate remedy for violations of statute. *Abbasi ex rel. Abbasi v. Paraskevoulas*, 187 Ill.2d 386, 393 (1999).

strengthening of the criminal penalties (while at the same time omitting any discussion of instituting civil relief) establishes that the Hazing Act's purpose – to criminally punish hazing – is fully implemented without a civil cause of action.

Furthermore, the *Abbasi* opinion lays bare how *Quinn*, *Haben*, and the appellate court's opinion use the Hazing Act as an end-run around this court's preemption decisions in alcohol-related liability cases. The *Abbasi* court held the private right there was unnecessary to "uphold and implement the public policy behind the Act" because it would have been identical to the plaintiff's negligence action for the same injury. But here, institution of the private cause of action would actually circumvent the State's and Hazing Act's stated public policy to treat hazing solely as a criminal act, as expressed by General Assembly.

Numerous Chapter members were criminally prosecuted after David's death, indicating the Act's efficacy without the need for a civil action to uphold its purpose. To endorse the prayed-for cause of action would require this court to forgo its preemption decisions for alcohol-related civil liability when public policy does not require it.

**b. This court has rejected other arguments to extend criminal statutes and circumvent deference to the General Assembly's enactments on alcohol-related liability.**

Finally, *Quinn, Haben*, and the appellate court's opinion contravene other instances in which this court has rejected the bootstrapping of a criminal statute to evade the General Assembly's preemption of the entire field of alcohol-related liability.

For instance, in *Wakulich* the plaintiff argued that because minors are a legally "protected class" under the delinquency act, an adult who served them alcoholic beverages should be subject to tort liability for resulting injuries. 203 Ill.2d at 231. This court rejected the attempt to circumvent the preemption of alcohol-related liability by creating a whole new class of claims and plaintiffs, without the General Assembly's input.<sup>5</sup>

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<sup>5</sup> *Quinn, Haben*, and the appellate court's opinion base their exception on the factor of social "pressure" to drink.—See, *Quinn's* first factor for civil liability under the Hazing Act, that "the plaintiff was required to drink to intoxication, *via* social pressure to comply with initiation requirements." 155 Ill.App.3d at 237. But *Wakulich* admonishes that an alleged violation of the delinquency act did not state a cause of action for alcohol-related liability even though a minor "was pressured to drink to excess." 203 Ill.2d at 240. The *Wakulich* court determined that the



Indeed, *Wakulich* emphasizes that the legislature has carefully expanded alcohol-related liability only for specific groups of defendants, not wide swaths of potential plaintiffs. 203 Ill.2d at 236, *infra*, “Thus far the General Assembly has determined that civil liability for alcohol-related injuries is *limited to two groups of defendants*: ... .” The opinion then recites a litany of under-age drinking statutes under which the General Assembly had not decided to create alcohol-related civil liabilities. 203 Ill.2d at 236.

More recently, in *Doe v. Psi Upsilon Int’l*, 2011 IL App (1<sup>st</sup>) 110306, the appellate court reviewed an action in which a student alleged she became heavily intoxicated at a fraternity party, leaving her more vulnerable to a subsequent rape by classmate. She brought an action against the fraternity, alleging that the fraternity’s act of providing her alcohol fomented gender-related violence in violation of the Gender Violence Act. ¶6.

The appellate panel correctly dismissed the case against the fraternity, seeing invocation of the Gender Violence Act as an attempt to impose

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delinquency act alone provided sufficient protection to the Illinois public even when the alleged violation involved alcohol. The court determined it unnecessary to upend its alcohol-related liability preemption jurisprudence to “strengthen” the delinquency act’s protections.

alcohol-related liability in contravention of *Charles* and *Wakulich*. The appellate panel was thus “unwilling to create an exception through application of the Act when the legislature has not made it clear that the Act was intended to be used for such a purpose.” ¶14.

*See also, Charles*, 165 Ill.2d at 489, reciting cases in which this court has rejected theories of alcohol-related liability based on common law, the Dramshop Act, and the Liquor Control Act of 1934.

Other than *Quinn*, *Haben*, and the appellate court’s opinion, no support is found in Illinois law to extend alcohol-related liability beyond that which is expressly allowed by the General Assembly. The Hazing Act does not expressly or impliedly authorize the cause of action recognized by the appellate court. The opinion must be reversed.

**B. The appellate court misapplied the voluntary undertaking doctrine, allowing allegations to stand without even identifying which member voluntarily undertook complete and exclusive charge of David Bogenberger’s care after he became unconscious.**

Apart from its improper alcohol-related liability allegations, plaintiff pleads that fraternity members negligently discharged their voluntarily undertaking to care for the unconscious pledges. Despite the pleading’s failure to allege any particular undertaking that proximately caused David’s

death, the appellate court reversed the 2-615 dismissal, reinstating the cause of action against the members and the Chapter on a *respondeat superior* theory.<sup>6</sup>

To state a claim based on a duty arising from a voluntary undertaking, the plaintiff must allege (1) the defendant took “complete and exclusive charge” of the plaintiff; (2) defendant failed to exercise due care in the performance of the undertaking; and (3) the failure to do so increased the risk of such harm. *Wakulich*, 203 Ill.2d at 242-43; Restatement (2d) of Torts §323(a).

Even after two rounds of pleading-directed discovery, access to official investigations and interviews with defendants and witnesses, the fifth amended complaint still generally alleged only that “presently unknown active members” of the fraternity placed the unconscious pledges around the house and oriented each so that he would not choke on vomit; and that unknown members discussed whether to call 911 or seek medical care, but they decided not to. *R.C3037*.

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<sup>6</sup> The Chapter joins and adopts the Joint Brief of Defendants-Appellants on the voluntarily undertaking issue.

Plaintiff's inability to identify (1) which individual committed to voluntarily acts; (2) which member had taken complete and exclusive control of David Bogenberger's care; and (3) whether or how any voluntary act had placed David in a worse position than before undertaking any act on his behalf; all led to the complaint's dismissal R.C3456. The appellate reversal ignores the failure to plead the tort's elements.

Indeed, it is impossible to reconcile how as many as 27 members could somehow take complete and exclusive charge of David's care without identifying what each of them allegedly did. (Or for that matter, didn't do to complete the voluntary undertaking.)

Thus, while the opinion cites *Wakulich* as a basis for upholding the complaint, the panel misses that *Wakulich* involved just two defendants, identified by name, as the actual actors who allegedly voluntarily undertook to care for the minor-decedent. Despite extensive discovery and documented investigation here, plaintiff instead merely offers allegations "on information and belief," allegations which are not equivalent to an allegation of fact, particularly after the discovery afforded plaintiff in the circuit court. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶40.

Furthermore, the complaint alleges only that these unknown fraternity members positioned David so that he would not aspirate vomit, should he vomit. In particular, though, the complaint is silent on how – or even if – this placement left David in a worse position than he had been in before. The complaint cannot reasonably be read that the voluntarily-undertaken acts worsened David's condition or proximately caused his death.

Yet even if the complaint is so liberally read to suggest that the alleged placement-undertaking left David in a worse position than he had been in, that reading would correspondingly limit liability to this alleged negligent placement. *See, Frye v. Medicare-Glaser Corp.*, 153 Ill.2d 26, 32-33 (1992), holding, "[U]nder a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking."

But even then, the complaint does not allege that David's orientation failed to prevent aspiration, nor that it caused him any harm. The complaint does not even allege that he vomited at all.

The injured person's outcome or condition alone is not a sufficient allegation of the duty's breach. The undertaking is not necessarily a failure if unsuccessful:

The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue them indefinitely, or even until he has done everything in his power to aid and protect the other. The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him.

*Bell v. Hutsell*, 2011 IL 110724, ¶24.

Thus, the appellate court's reversal relies on a host of facts merely alleged on "information and belief" even though the plaintiff undertook extensive discovery into them; and then assumes the other elements of the voluntary undertaking are present simply by virtue of David's eventual death. The circuit court correctly saw the inability to properly plead after six opportunities, and dismissed the causes of action.

But even more so, the appellate court summarily held that through those scant allegations plaintiff sufficiently pled vicarious liability against the Chapter "since the elected officers and pledge board members ... were acting within the scope of their authority in planning and executing the event." ¶40. But again, the plaintiff's sixth attempt to state fails to support both the tort's elements and the added elements of vicarious liability.

For instance, the complaint does not allege that the members' choices to place the pledges around the house or orient them in a certain way were made within the scope of any Chapter authority. There is no allegation that

any group of officers or pledge board members made the placement decisions, only that they were done by “presently unknown active members.” R.C3036. The complaint does not even allege that the decision to orient the pledges in that manner took place at the organizational meetings before Mom & Dad’s Night.

Nor does the appellate court’s opinion explain how an unidentified agent who, in the moment decides to assist an unconscious person, can be acting within the scope of the principal’s authority. Those decisions by the “presently unknown fraternity officers and active members” were simply the result of an *ad hoc* assembly of still-awake fraternity members.

No post-event meetings are alleged to have taken place; nor does the complaint plead that the placements were dictated by Chapter officers. Even the discussion about whether to call for medical assistance is alleged to have been among “presently unknown fraternity officers and active members,” not Chapter leadership.

The fifth amended complaint fails to allege that any post-event voluntary undertaking was performed within the scope of Chapter authority. The appellate court incorrectly expanded the liability recognized for a voluntary undertaking, and improperly assumed that such an undertaking was done

pursuant to Chapter authority. The plaintiff has not pled *respondeat superior* liability for the Chapter in the fifth amended complaint.

### Conclusion

For all of the foregoing reasons, the Eta Nu Chapter of Pi Kappa Alpha International Fraternity respectfully requests that this court reverse the opinion and judgment of the appellate court, and affirm the circuit court's December 11, 2014, opinion and order dismissing the plaintiff's action.

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 appended, is 6638 words.



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# APPENDIX

## **Appendix**

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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.

PI KAPPA ALPHA CORPORATION, et. al.,

Defendants.

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AMENDED<sup>1</sup>  
MEMORANDUM OPINION AND ORDER ON DEFENDANTS'  
2-615 MOTIONS TO DISMISS FIFTH AMENDED COMPLAINT<sup>2</sup>

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

C. 3451

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 Bouleanu, Daniel Post, John Wallace, Thomas Bralis, Andres Jiminez, Nicholas Sutor, Nsenzi Salasini, Russell P. Coyne,<sup>3</sup> and Greg Petryka, (with Greg Petryka filing a separate motion), Defendants fraternity officers Alexander Jandick, James P. Harvey, Patrick W. Merrill, <sup>4</sup> Omar Salameh, Steven Libert, John Hutchinson, and Daniel Biagini, Defendants female fraternity guests/participants Kelly Burbach, Lindsey Frank, Janet Luna, Jessica Anders, Tiffany Schweinfurth, Nicole Minik, Alyssia Allegretti,

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<sup>3</sup> See Footnote 1, *supra*.

<sup>4</sup> 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

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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.<sup>5</sup>

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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<sup>5</sup> 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.

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615 Motions to Dismiss are granted with prejudice against all Defendants <sup>6</sup> and with no further leave to replead.

This Amended Memorandum Opinion and Order is entered *nunc pro tunc* to 1/3/2014  
December 11, 2014.

**ENTER**

DEC 12 2014

KATHY M. FLANAGAN #267

ENTER:

*Kathy M. Flanagan*  
Judge Kathy M. Flanagan

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<sup>6</sup> 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.

# Illinois Official Reports

## Appellate Court



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***Bogenberger v. Pi Kappa Alpha Corp., 2016 IL App (1st) 150128***

### Appellate Court Caption

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 UNIVERSITY, 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. VERGARALOE; MICHAEL D. PFEST; ANDRES J. JIMENEZ, JR.; ISAAH LOTT; ANDREW W. 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.

District & No.	First District, First Division Docket No. 1-15-0128
Filed	June 13, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 2013-L-1616; the Hon. Kathy M. Flanagan, Judge, presiding.
Judgment	Affirmed in part; reversed in part. Remanded for further proceedings.
Counsel on Appeal	Law Office of Michael W. Rathsack, of Chicago (Peter R. Coladarci and Michael W. Rathsack, of counsel), for appellant.  Johnson & Bell, Ltd., of Chicago (Eric W. Moch, of counsel), for appellees Pi Kappa Alpha Corporation, Inc., Pi Kappa Alpha International Fraternity, and Eta Nu Chapter of Pi Kappa Alpha International Fraternity.  Dykema Gossett PLLC, of Chicago (Michael C. Borders, of counsel), for appellee Alexander Jandick.  O'Hagan LLC, of Chicago (Daniel J. Nolan, of counsel), for appellees Kelly Burback, Lindsey Frank, Janet Luna, Jessica Anders, Tiffany Schweinfurth, Nichole Minnik, and Adriana Sotelo.  Scott Halsted & Babetch, P.C., of Chicago (Robert K. Scott, of counsel), for appellee Steven A. Libert.  Law Offices of Meachum, Starck & Boyle, of Chicago (Thomas W. Starck and Cathleen Hobson, of counsel), for appellee Andrew W. Bouleanu.  Smith Amundsen LLC, of Chicago (Michael Resis, of counsel), for appellees Thomas F. Costello, Hazel A. Vergaralope, Nelson A. Irizarry, Kevin Rossetti, and Michael Pfest.  Mulherin, Rehfeldt & Varchetto, P.C., of Wheaton (Ray H. Rittenhouse, of counsel), for appellee David R. Sailer.

Higgins & Burke P.C., of St. Charles (John Higgins and Brittany A. Higgins, of counsel), for appellee Andres Jimenez.

Clausen Miller P.C., of Chicago (George K. Flynn and Kim Hartman, of counsel), for appellee Isaiah Lott.

Querrey & Harrow, Ltd., of Chicago (Kevin J. Caplis and David M. Lewin, of counsel), for appellees John Wallace and Thomas Bralis.

ML Le Fevour and Associates, Ltd., of Burr Ridge (Mark Le Fevour, of counsel), for appellee Daniel Post.

Greene & Letts, of Chicago (Eileen Letts, of counsel), for appellee Michael J. Phillip, Jr.

Kopka, Pinkus & Dolin P.C., of Chicago (Timothy Palumbo, of counsel), for appellee Patrick W. Merrill.

Cameli & Hoag, P.C., of Chicago (Tom Cameli and Stephen M. Brandenburg, of counsel), for appellee Daniel Biagini.

Esp Kreuzer Cores LLP, of Wheaton (Douglas J. Esp, of counsel), for appellee Estefan A. Diaz.

James P. Pelafas & Associates, of Elmhurst (James P. Pelafas and David Goldberg, of counsel), for appellee Prudence Willrett.

Chilton Yambert Porter LLP, of Chicago (Jon Yambert and Joseph Vallort, of counsel), for appellee Alyssa Allegretti.

Law Offices of Capuani & Schneider, of Chicago (Todd Schneider, of counsel), for appellee Nicholas Sutor.

Sanchez Daniels & Hoffman LLP, of Chicago (John S. Huntley and Renee Ziolkowski, of counsel), for appellee Jonathan Hutchinson.

Wolfe & Jacobson, Ltd., of Chicago (David Wolfe, of counsel), for appellees Raquel Chavez and Russell P. Coyner.

Molzahn, Rocco, Reed & Rouse, LLC, of Chicago (Tim Reed and Pete Maisel, of counsel), for appellee Kristina Kunz.

Malcom P. Chester, of Des Plaines, for appellee Katie Reporto.

Condon & Cook, LLC, of Chicago (Mark B. Ruda and Guy M. Conti, of counsel), for appellee Omar Salameh.

Larose & Bosco, Ltd., of Chicago (David Koppelman and Joseph A. Bosco, of counsel), for appellee Alexander Renn.

Paul E. Kralovec, of Chicago, for appellee James P. Harvey.

Michael Malatesta, of Chicago, for appellee Nsenzi K. Salasini.

Daniel P. Costello & Associates, of Chicago (Daniel P. Costello, of counsel), for appellee Courtney Odenthal.

Ripes, Nelson, Baggot & Kalabratsos, PC, of Chicago (Brian White and Michael J. Ripes, of counsel), for appellee Gregory Petryka.

Alan H. Shifrin & Associates, LLC, of Rolling Meadows (Terry D. Slaw, of counsel), for appellee Michael A. Marroquin.

Brenner, Monroe, Scott & Anderson, Ltd., of Chicago (Amy L. Anderson and Joshua Bell, of counsel), for appellee Pike Alum, L.L.C.

Stellato & Schwartz, Ltd., of Chicago (Esther Joy Schwartz, Donald E. Stellato, and Howard J. Fishman, of counsel), for appellee Nichole Manfredini.

Panel

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

#### 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 University, 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).

#### JURISDICTION

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.

#### BACKGROUND

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.

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.

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 "p\*\*\*\*" and "b\*\*\*\*" until they drank. After progressing through the seven rooms, each pledge had consumed three to five glasses of vodka in each room within 1½ 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 0.43 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.

#### ANALYSIS

¶ 13 On appeal, plaintiff first contends that the trial court erred in dismissing his negligence  
¶ 14 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.<sup>1</sup> *Id.* at 487. In *Cruse v. Aden*, 127 Ill. 231-39 (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 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

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<sup>1</sup>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.

<sup>2</sup>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

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 eight-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 0.25. 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.* 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. *Simplins 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." *Yurelich v. Sole*, 259 Ill. App. 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 1½ hours. It further alleged that the event was not sanctioned by NIU and violated the Hazing Act.<sup>2</sup>

¶ 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

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<sup>2</sup>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 bodily harm to any person. 720 ILCS 5/12C-50 (West 2012).



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 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; *Haben*, 232 Ill. App. 3d at 267. 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 (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 e-mail 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. *Quinn*, 155 Ill. App. 3d at 235. 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. *Lance*, 36 Ill. 2d at 518. 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 "p\*\*\*\*" and "b\*\*\*\*" 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 1½ hours. It is clearly foreseeable that requiring a person to consume 21 ounces of vodka in 1½ 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[s] 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. *Id.* 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 State, 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 5/12C-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 by 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.

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