No. 120951

(Consolidated with 120967 and 120986)

# IN THE ILLINOIS SUPREME COURT

GARY I. 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; 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 CHEINFURTH; ADRIANNA SOTELO; PRUDENCE WILLRET; KARISSA AZARELA; MEGAN LEDONE; NICHOLE MANFREDINI; JILLIAN MERRILL; and MONICA SKOWRON;

*Defendants-Appellees,*

(*caption continued on next page*)

# BRIEF of APPELLEES PI KAPPA ALPHA CORPORATION, INC., and PI KAPPA ALPHA INTERNATIONAL FRATERNITY

On Appeal from the Illinois Appellate Court First Judicial District, First Division,
Docket No. 1-15-0128
There heard on appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division
No. 2013 L 1616
The Honorable Kathy M. Flanagan, Judge Presiding

Eric W. Moch
Robert E. Elworth
HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100
emoch@heplerbroom.com
relworth@heplerbroom.com

Attorneys for appellees Pi Kappa Alpha Corporation, Inc., and Pi Kappa Alpha International Fraternity.

*and*

ETA NU CHAAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS, an unincorporated association; ALEXANDER M. JANDICK, individually and as an officer of ETA NU CHAPTER OF PI KAPPA ALPHA INTERNATIONAL FRATERNITY AT NORTHERN ILLINOIS UNIVERSITY; JAMES P. HARVEY, individually and as 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; J. PHILLIP, Jr.; THOMAS F. COSTELLO; DAVID R. SAILER; ALEXANDER D. RENN; MICHAEL A, MARROQUIN; ESTEFAN A. DIAZ; HAZEL A. VERGARALOPE; MICHAEL D. PFEST; ANDRES J. JIMENEZ, JR.; ISAIAH LOTT; ANDREW W, BOULEANU; NICHOLAS A. SUTOR; NELSON A. IRIZARRY; JOHNNY P. WALLACE; DANIEL S. POST; NSENZI K. SALASINI; RUSSELL P. COYNER; GREGORY PETRYKA; KEVIN ROSSETTI, and PIKE ALUM, L.L.C.,

*Defendants.*

## Points and Authorities

## Nature of the Case

Plaintiff, Gary L. Bogenberger, as special administrator of the estate of David R. Bogenberger, deceased, filed a twelve-count fifth amended complaint against defendants as a result of his son's death following a fraternity pledge event known as "Mom & Dad's Night" at the Eta Nu Chapter of the Pi Kappa Alpha fraternity house on the campus of Northern Illinois University. Defendants include two Pi Kappa Alpha international fraternity organizations, the 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. 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). Counts I and II of the fifth amended complaint were directed at 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.

The trial court granted all 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 panel affirmed all other dismissals, including those earned by the two Pi Kappa Alpha national Fraternity organizations at issue in this brief.

The question raised is on the pleadings.

## Issues Presented for Review

1. The local Pi Kappa Psi fraternity chapter was subject to an anti-hazing policy issued by the national Fraternity. Certain members of the local chapter are alleged to have ignored the policy, and hazed David Bogenberger through the ingestion of excessive amounts of alcohol, resulting in his death. Is the national Fraternity vicariously liable for his death?

2. The national Fraternity issues rules, regulations, and policies forbidding the hazing of pledges through the use of alcohol during pledging activities. Ultimately, however, the local chapter is in complete control over how it conducts its rush activities. In the event that a pledge is injured as the result of a hazing decision made by the local chapter and its members, did the national fraternity owe a direct duty to the pledge to have prevented that injury?

## 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 petitioner/appellant plaintiff 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.

This court has jurisdiction pursuant to Rule 315.

## 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. Dismissals 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 entity Pi Kappa Alpha Corporation, Inc. ("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.* The circuit court dismissed all counts upon the defendants' 2-615 motions. *R.C954.*

Plaintiff obtained leave to file the third amended complaint before the motions to dismiss the second amended complaint were heard. *R.C1650.* 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.C1651.*[1]

Thereafter, the circuit court issued another opinion granting all 2-615 motions to dismiss the third amended complaint. *R.C1948.*

Plaintiff conducted further discovery before the fourth amended complaint was filed, receiving interrogatory answers and documents from

---

[1] For purposes of this brief, these appellees Pi Kappa Alpha International Fraternity and Pi Kappa Alpha Corporation jointly reference themselves as "the Fraternity" or "the national Fraternity."

the Fraternity; 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.*

**2. Discovery obtained from the national Fraternity before the fifth amended complaint was filed.**

Mr. Buck's deposition lasted three hours. *R.C3586, 3700.* He confirmed that:

- The national Fraternity implemented and published an official long-standing Anti-Hazing Standard which precludes hazing in all forms, and it has established a partnership with HazingPrevention.org. *R.C3610-3611.*
- The Chapter received an administrative suspension and ultimately a permanent suspension after the incident. *R.C3617.*
- The Chapter's "Mom & Dad's Night" was and is a direct violation of the Fraternity Standards against hazing and against distribution of alcoholic beverages to pledges and new members. *R.C3645.*
- He had no knowledge that the "Mom & Dad's Night" occurred before reading the Complaint. *R.C3646.*

- The national Fraternity does not control any chapter's activities or undertake a duty to ensure that a chapter abides by the law, regulations of the host school or the standards of the Fraternity. *R.C3647.*
- The national Fraternity does not conduct a chapter's rush activities or make its pledging and initiation decisions. *R.C3652.*
- Nevertheless, the national Fraternity makes its risk awareness program materials available to each chapter on the Fraternity web site. *R.C3684-3685; 3691.*
- The Eta Nu chapter was self-operated, self-governed, and self-financed. *R.C3707.*
- The national Fraternity does not recruit for the Eta Nu or any other chapter. *R.C3706.*
- The national Fraternity does not require the hosting of "Mom & Dad's Night" as a condition of membership. *R.C3707.*
- The national Fraternity does not require new members to drink alcohol as a condition to membership. *R.C3708.*
- "Mom & Dad's Night" was not and is not part of qualifications for membership; nor is it part of the Fraternity's initiation ritual. *R.C3707-08.*
- The national Fraternity's sole office is in Memphis, Tennessee. *R.C3703.*

Ultimately the deposition revealed no evidence that any Fraternity employee or staff member even knew about, much less planned, encouraged, or allowed the Chapter's "Mom & Dad's Night."

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

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

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 & Dad's Night." The event had been planned by Chapter officers and members of the pledge board on several nights beforehand. *R.C3032.* The complaint does not allege the Fraternity had any involvement in the planning or execution of the event.

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 the members told the pledges attendance and

participation was a "mandatory prerequisite to active membership in the fraternity." *R.C3033.*

The members' 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.*

Counts I and II of the fifth amended complaint allege vicarious and direct negligence by the national Fraternity. *R.C3037-3051.* The counts allege that the Fraternity organized, promoted, and recruited membership for local chapters, whose activities it supervised and controlled through adherence to the Fraternity Constitution, including a Hazing Policy. *R.C3037, 3044 ¶1.* The Fraternity reserved the right to suspend or expel local chapters and

members for violations of the Fraternity's Constitution, rules, and policies. *R.C3038, 3045* ¶2. The Fraternity assessed the local chapters' compliance through an annual, week-long, visit by a Chapter Consultant. *R.C3039, 3046* ¶3. Furthermore, the Fraternity as supported by fees collected by local chapters from fraternity members, which constituted at least 75% of its gross income. *R.C3040, 3047* ¶5.

The counts further allege that the national Fraternity owed David Bogenberger "a duty to prevent the foreseeable consequences of required excessive consumption of alcohol during initiation ritual, including death." *R.C3041, 3048* ¶8.

The counts seek damages against the national Fraternity for permitting and allowing "dangerous pledge events" which included alcohol consumption in violation of the Illinois Hazing Act. The counts further allege the Fraternity failed to warn the chapters of such behavior, or to issue policies to prevent it; and to take reasonable steps to determine if the policies in place were being followed. Additionally, the counts allege the Fraternity "encouraged" events similar to "Mom & Dad's Nights" to drive pledging; and for its failure to ban pledge events that "were likely to result in bodily harm and death to fraternity pledges." *R.C3042, 3049* ¶10.

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.*

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

On December 11, 2014, Judge Kathy Flanagan granted all 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.[2] *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

---

[2] *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.*

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 upholds the Fraternity's 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 (1st) 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*[3], *Charles* and *Wakulich*, noting the "broad holding" that no social host liability exists for alcohol-related injuries. *Opinion, ¶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. *Opinion, ¶19.*

---

[3] *Cruse v. Alden*, 127 Ill. 231 (1889).

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." *Opinion,* ¶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." *Opinion* ¶29. The court agreed with *Quinn* that such a circumstance is distinguishable from the social host circumstances presented in *Charles* and *Wakulich,* decisions which the panel noted had not included a definition for "social host." *Opinion,* ¶¶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 against the Chapter members under the *Quinn* and *Haben* decisions. The court based this decision 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. *Opinion,* ¶¶36-39.

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." *Opinion, ¶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. *Opinion, ¶¶41-47.* The court also affirmed the dismissal of counts against the nonmember women defendants and chapter-house landlord. *Opinion, ¶¶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

In the face of contradictory policies and rules, even the organizational Constitution, plaintiff nevertheless contends the national Fraternity not only controlled the day-to-day planning of pledging events, but also encouraged the disabusement of those very rules by a local membership.

While such logically-incredulous allegations are not automatically dismissed under the 2-615 standard, dismissal is warranted when the allegations themselves do not include a factually-supported assertion of duty, either vicariously through agency concepts or as a direct duty to a pledge.

Reduced to its base, plaintiff's duty assertions conflate ***hazing*** with the Fraternity's inceptive interest in the ***pledging*** process and ongoing membership. The complaint takes the Fraternity's interest in and support for membership and simply labels them "encouragement" for hazing. But the complaint offers no factual allegation to support that the Fraternity "benefits" from hazing, as opposed to pledging and membership. *Brief, p. 16.* And without any allegation how the Fraternity controlled the Chapter's pledging process, the appellate panel correctly determined that even after discovery and six efforts to plead, the complaint still failed to allege a cognizable duty against the Fraternity.

**A. The national Fraternity cannot be held vicariously liable for the local membership's hazing activities, done in violation of the national rules and without the Fraternity's support or knowledge.**

The complaint's allegations leave no doubt that the choice to include hazing as an aspect of "Mom & Dad's Night" was a local decision, made solely by Chapter members. The local members "met and approved and adopted" the pledge event, determining that "most if not all" of the pledges would become unconscious and insensate. *R.C3032-33 ¶¶4, 7.* Those members directed the pledges to arrive at a certain time and how they should dress, and the evening's purpose. *R.C3033-34 ¶¶12, 13.* Those members also told the pledges the event was mandatory. *R.C3033 ¶11.*

The planning members "sought" volunteers for the event and "directed" them to obtain and serve vodka to the pledges. *R.C3034 ¶¶15, 16.* Those volunteers were then placed in rooms about the house, where they "required and directed" each pledge to drink from his glass of vodka. *R.C3035 ¶21-23.*

After the pledges began to pass out, they were placed in "previously designated places." *R.C3036 ¶29.* Certain members then discussed and decided not to seek medical attention for the insensate pledges. *R.C3037 ¶34.*

Indeed, the complaint's cumulative paragraphs 5 through 34, wherein the planning and execution of hazing during "Mom & Dad's Night" is alleged and described, includes no mention of the national Fraternity. *R.C3032-37.*

Furthermore, the complaint does not allege that the Fraternity endorses hazing during pledge events. Quite the contrary, as plaintiff acknowledges that that such activity is directly contrary to the Fraternity's Constitution, codes, and policies. *R.C3037-36, 3044-45 ¶¶ 1, 2.*

Therefore, the hazing activity is reasonably considered outside the scope of any alleged agency relationship between the members and the Fraternity. The appellate panel correctly determined that the hazing activity, so actively proscribed by all national directives, was outside the scope of any authority and did not state a claim for vicarious liability. *Opinion, ¶42.*

But initially, the actual existence of an agency relationship between the Fraternity and local members must be established through allegations of fact, not as conclusively alleged in the complaint. And that legal conclusion is wholly contrary to the national consensus in similar fraternity-hazing cases.

**1. The fraternal relationship between the national organization and a local chapter is not an authorization to act on behalf of the national fraternity for purposes of vicarious liability.**

As the complaint notes, a national fraternity has the right to suspend or revoke a chapter's charter after a violation occurs; provide advice; issue rules and standards; and receive dues from the chapter. However, such characteristics of the fraternal relationship do not resolve that the national organization becomes vicariously liable for individual conduct or torts of local members.

The recent case of *Smith v. Delta Tau Delta*, 9 N.E.3d 154 (Ind. 2014), involves a pledge who overindulged in alcohol at a chapter event, and provides an analysis of why the fraternal relationship does not create a principal/agent relationship. In sum, the national organization does not (and functionally cannot) monitor or control a chapter's day-to-day activities nor its adult officers and members, often located hundreds of miles away.

The Indiana Supreme Court reasoned:

> The relationship between the national fraternity and the local fraternity involves the national fraternity offering informational resources, organizational guidance, common traditions, and its brand to the local fraternity. Additionally, the national fraternity furthers joint

> aspirational goals by encouraging individual members' good behavior and by investigating complaints and reports that affect the health, reputation, and stability of local chapters. The national fraternity has the right to discipline, suspend, or revoke its affiliation with the local fraternity or its members. The local fraternity's everyday management and supervision of activities and conduct of its resident members, however, is not undertaken at the direction and control of the national fraternity. The local fraternity is responsible for electing its own officers without the consent or oversight of the national fraternity. Local officers are expected to abide by the aspirational goals promulgated by the national fraternity, but are never given the authority to act on behalf of the national fraternity.
>
> 9 N.E.3d at 164.

And although the *Smith* decision was an affirmance of a summary judgment entry, the court resolved it as a matter of law – the legal relationship alleged simply does not exist. "This is not a matter upon which there is any dispositive issue of material fact but rather an issue of law. The national fraternity is not subject to vicarious liability for the actions of the local fraternity, its officers, or its members." 9 N.E.3d at 165.

The seminal decision in *Alumni Assn. v. Sullivan*, 524 Pa. 356 (1990), also involving service of alcohol by a chapter, recognizes that it is a "fraternal" relationship of equals, not a "paternal" relationship, and because the

national organization lacks the resources and capability to undertake day-to-day control, vicarious liability cannot be found. 524 Pa. at 365.

There, the Pennsylvania Supreme Court focused on the national organizations' inability to monitor the activities of their respective chapters, reserving only the power to discipline an errant chapter after the fact. "It does not possess the resources to monitor the activities of its chapters contemporaneously with the event. ...[T]here is no basis in the relationship to expand the liability of the national body to include responsibility for the conduct of one of its chapters." 524 Pa. at 365-66.

The complaint here alleges that the Fraternity promulgates guidelines, advises affiliated chapters, retains the right to suspend or expel chapters after the fact, encourages membership retention and benefits from the collection of money dues. Those are typical of any relationship where membership in a non-profit fraternal association is involved on a long distance basis.

As a matter of law though, even if the complaint was properly pled with specific facts, those allegations do not make local members employees, agents, or servants of the Fraternity; nor are they subject to the Fraternity's day-to-day control when those chapters are located hundreds or even thousands of miles away from the Memphis office. Plaintiff cannot invoke

vicarious liability against the Fraternity for torts committed by members in direct violation of the Fraternity Constitution, rules and policies against hazing. There simply is no legally-recognizable agency relationship upon which vicarious liability can be based.

**2. Even assuming an agency relationship between the Fraternity and local members, all of the hazing acts were outside the scope of agency and cannot create vicarious liability.**

The appellate court reasonably determined that when a national fraternity issues a hazing policy precluding the very acts at issue here – physical discomfort through the use of alcohol – then the members' actions fall outside the scope of their agency. *Opinion,* ¶42. [4]

Perhaps in light of that holding, plaintiffs initially argues that there is no "auto-shield" forcing violations of the principal's rules to be outside the scope of their agency. *Brief, p. 17.* And then, plaintiff follows up with other arguments that seek to obviate or argue away the members' clear violations

---

[4] The complaint recites the Hazing policy:

No chapter, colony, student or alumnus shall conduct nor condone hazing activities, defined as 'Any action taken or situation created, intentionally, whether on or off fraternity premises, to produce mental or physical discomfort, embarrassment, harassment or ridicule. Such activities may include, but are not limited to the following: Use of alcohol …;" *R.C3038.*

of rules despite falling outside the scope of agency, either by the Fraternity's alleged knowledge of or acquiescence in the Mom & Dad's Night event. *Brief, pp. 19-23.*

Yet later in the brief, plaintiff nevertheless argues that the hazing was ***within*** the scope of authority. *Brief, p. 23.* For continuity's sake, the questions will be reversed here.

But regardless of where plaintiff contends the members' actions fall, the theory running behind each argument is the very conflation of *hazing* with *pledging*, noted above. In each section the Brief equates those actions, treating them as essentially inseparable. While this is a strategic effort to blur the local Chapter's actions with the national Fraternity's rules, once that disunion is removed the appellate panel's affirmance is shown to be correct.

**a. The members' performance of acts specifically forbidden by the Fraternity were not undertaken within the scope of agency.**

Assuming *arguendo* that the members are agents of the Fraternity, the complaint still must have alleged that the Fraternity "controlled or had the right to control" their behavior; and that the hazing "fell within the scope of the agency." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶18. 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).[5]

The scope of the members' agency would extend only to pledges' induction into the Fraternity. The Fraternity issues guidelines to its numerous chapters on how to conduct and effectuate rush and initiation. Nothing in those rules requires or encourages hazing. Instead, as the appellate panel affirmatively stated, the Fraternity's policies prohibited hazing, thus placing the "agents' actions outside the scope of their agency." *Opinion*, ¶42.

Or with reference to *City of Champaign v. Torres*, 346 Ill.App.3d 214, 217 (2004), cited in the appellant's brief, one cannot reasonably argue that the

---

[5] *See also, Adames v. Sheahan*, 233 Ill.2d 276 (2009), citing the Restatement (2d) of Agency §228 (1958), for the three general criteria used in determining whether an employee's acts are within the scope of employment:

(1) Conduct of a servant is within the scope of employment if, but only if:
   (a) It is of the kind he is employed to perform;
   (b) It occurs substantially within the authorized time and space limits;
   (c) It is actuated, at least in part, by a purpose to serve the master.
(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

members' decision to haze David Bogenberger was part of what they were "employed to do." Those members were arguably "employed" to secure new members for the ongoing stability of the national Fraternity. The complaint's repeated melding of pledging and hazing aside, pledging can occur without hazing; they are not dependent on one another.

Furthermore, neither the complaint nor the brief offer any suggestion how the Fraternity's interests were served or advanced by the members' decision to disobey the anti-hazing policies. The complaint alleges several ways in which plaintiff contends *pledging* benefits the Fraternity, all of them economic in nature. But nowhere does the complaint suggest that *hazing* hastens membership or otherwise benefits the Fraternity. And given the negative association and results that come from hazing, it is difficult to conceptualize how it ever could be so alleged.

Thus, this court should ignore the brief's baseless and conclusory arguments like, "Everyone involved believed hazing was good for pledge and even member retention, and that it would increase the national's dues income." *Brief, p. 24.* Neither the complaint nor brief offer any support for such a statement, and the Fraternity's policies directly dispute the assertion anyway.

Furthermore, the complaint does not allege the Fraternity had the right to control the manner in which the Chapter members conducted its rush or pledging activities. The closest the complaint comes is the allegation that the Fraternity "reserved the right and power to *assist* local chapters in the conduct of rush or pledging activities or require alcohol or hazing education," but that is not a statement of retained control over those rush and pledging activities. *R.C3038, 3045,* ¶¶2.

Moreover, Plaintiff does not challenge the appellate panel's citation to *Anderson, supra,* as providing controlling authority on the impact of rules on the issue of retained control to establish agency. In *Anderson*, the Boy Scouts of America ("BSA") challenged the assertion of vicarious liability after a local Cub Scout pack leader allegedly caused injury in a traffic accident. BSA argued that it "did not supervise or exercise any control over the day-to-day activities of local scouting units or the volunteer adult leaders of these units, in general, nor did it have any control over the actions of [the leader] in reference to the specific incident cited here." 226 Ill.App.3d at 442.

The appellate court upheld the BSA's dismissal because nothing showed the organization "specifically granted" BSA "direct supervisory powers over the method or manner in which adult volunteer scout leaders accomplish their tasks." 226 Ill.App.3d at 444. The complaint here reveals

the same conclusion. The local members mandated pledges' attendance and attire, not the Fraternity. The complaint does not allege that hazing or alcohol was required as a part of a "Mom & Dad's Night," or even that the event was a required part of the pledging process. To the extent the Fraternity provided guidance in rush and pledging activities, it was to preclude the very aspects the members elected themselves to undertake, hazing through excessive alcohol.

Plaintiff's citation to *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140 (Ct. App. 1986), similarly fails. First, the chapter event therein was the actual ritualized initiation, prescribed by the national organizations by-laws as "a formal, quasi-religious initiation ceremony." 291 S.C. at 152. Here, the Fraternity's own formal initiation rite, over which it exercised complete control, is fair afield from the informal "Mom & Dad's Night" the complaint itself alleges is neither unique in form or to Pi Kappa Alpha chapters, nationally. *Complaint, ¶1.*

But more importantly – and left out of the plaintiff's brief – is that *Ballou* turned on the fact that the national organization's by-laws did not "prohibit an active collegiate chapter from supplementing the initiation process by requiring candidates for membership to participate in an additional initiation activity." 291 S.C. at 152. Thus, because the local chapter chose to

supplement the rite, and require the pledges go through "hell night," the court deemed hazing injuries during the rite to be within the scope of the chapter's authority.

Here, the complaint recognizes and goes so far as to quote the Fraternity's policies precluding hazing, including the use of alcohol, in "recruiting techniques." The Fraternity left no room for members to embellish a controlled rite, or even a local pledging event, by adding hazing and alcohol, yet still be within the scope of their authority. Considering that the operative complaint labels "Mom & Dad's Night" a locally-planned "pledging activity," and not a nationally-proscribed initiation rite, the Fraternity's lack of control over the activity is further established.

Numerous courts have cited the lack of a national organization's contextual control over the daily decisions of local chapter to either haze pledges, or serve alcohol at chapter functions, as the reason to preclude vicarious liability against the organization.

*See, Foster v. Purdue Univ. Chptr, the Beta Mu of Beta Theta Pi*, 567 N.E.2d 865, 872 (Ct. App. Ind. 1991), holding no control when the national organization only offered guidelines and support services to local chapters, and had no power to implement specific procedures, only to suspend or revoke charters; *Alumi Ass'n v. Sullivan*, 524 Pa. 356, 365 (1990), holding no

control because, "national organizations do not have the ability to monitor the activities of their respective chapters which would justify imposing the duty appellant seeks;" *Walker v. Phi Beta Sigma Fraternity*, 706 S.2d 525, 529 (Ct. App. La. 1997), holding that the "national fraternity was not in a position to control the action of its chapters on a day-to-day basis."

Finally, plaintiff raises and then tries to distinguish the case of *Colangelo v. Tau Kappa Epsilon Fraternity*, 205 Mich.App. 129 (1994). While the facts therein did not involve hazing, the premise is essentially the same: the plaintiff alleged the national fraternity was negligent in supervising the "agent" local chapter, particularly the service of alcohol at a chapter party. 205 Mich.App. at 132.

Again, the appellate court noted that the national organization's articles of incorporation provide for discipline in the event that "its principles, rituals, and traditions are not observed by the local chapters" - in other words, after an occurrence. "Local chapters are responsible for the daily supervision of student members." 205 Mich.App. at 134.

Furthermore, plaintiff understates the Michigan court's review of the burden put on a national fraternity, with hundreds of chapters across the country, trying to manage and keep tabs on each chapter's daily events, to avoid members therein (adults, themselves) from contravening the

national's general policies on hazing and alcohol. There is nothing absurd about compelling each of those hundreds of chapters to manage its own affairs, and members, on those daily obligations. The duty sought in *Colangelo* and by plaintiff herein prays for is far more than a mere "reasonable effort to control and direct the local" – particularly in light of the national organization's previous issuance of rules and guidelines.

**b. The national Fraternity is not alleged to have ratified or encouraged hazing as a pledging strategy.**

When the brief turns to an assumption that the hazing was, as a matter of law, outside the scope of members' scope of agency, plaintiff argues that the Fraternity either turned a blind eye to it, or worse, ratified its practice, creating vicarious liability. The problem is, neither contention is alleged in the complaint.

For instance, the brief states that the rule against hazing "was not only not enforced but the national deliberately disregarded" it, and "encouraged pledge hazing events." *Brief, p. 19.* There simply is no allegation in the complaint to support those statements. The complaint alleges that the members "met and approved and adopted the plan," which apparently included hazing and alcohol. The complaint alleges no facts to support the

assertion that the national Fraternity encouraged the planned hazing and alcohol use, thereby dropping enforcement of its rules.

Again, these statements are examples of plaintiff's purposeful conflation of pledging and hazing, strategically combining them to create arguable notice, control, and liability. The complaint merely alleges that the Fraternity encouraged pledge events; the complaint does not allege any facts to support that the Fraternity encouraged hazing - or the brief would just cite to them. *R.C3032,* ¶2.

Furthermore, the brief continues, "The national went even further. The fraternity told pledges that participation was a condition for membership, ... ." *Brief, p. 19.* While it is perhaps unclear from this text whether *the fraternity* references the Chapter or the national Fraternity, the complaint is not unclear at all. Only the local members are alleged to have told the pledges "Mom & Dad's Night" was a mandatory prerequisite to membership. *R.C3033,* ¶12.

The subsequent assertion that "the national itself led local members to believe the rule against hazing was nothing more than window dressing" is similarly unsupported by any allegations facts in the complaint. *Brief, p. 21.* There simply is no fact alleged to describe how the Fraternity led the members to believe that.

Finally, the brief contends the national Fraternity "knew of this event." *Brief, p. 21.* Again, the complaint does not allege any fact establishing the contention. Instead, the brief delves solely into the concept of foreseeability, based on an annual on-campus Chapter visit.

The brief is not entirely clear on the point to be made. It asserts that if the Fraternity knew of the "hazing event," it would have been foreseeable that the Chapter would continue to use this "pledge event." *Brief, p. 22.* But again, it is not the use of "pledging events" that causes foreseeable injuries; it is the precluded hazing. The argument is backward.

And the thin plea at the end of the argument, praying for discovery, ignores that plaintiff has already deposed the Fraternity's chief executive officer and reviewed thousands of pages of investigatory reports, all for the express purpose of allowing plaintiff to plead the fourth and fifth amended complaints. Mr. Buck, of course, explicitly denied the allegations plaintiff has still put forth in its subsequent pleadings.

**3. Public policy considerations favor a finding that the actions of a local chapter and its members do not create vicarious liability for the national organization.**

Finally, several points of public policy suggest that imposing vicarious liability on a national fraternity for the acts of a local chapter or its members - especially when those acts are contrary the organization's written policies - is unwarranted.

First, as described above in the *Smith* and *Alumni Association* decisions cited above, the relationship between a national fraternity and the local chapter is not a paternal one. Nor is it akin to a typical employer/employee relationship, where the employer pays the employee to act on its behalf. If an on-campus fraternity house existed unaffiliated with a national organization, it still would have to perform pledging events, raise money, and generally conduct itself the same as an affiliated chapter; whereas in the absence of an employment contract, a person would have no reason to perform tasks on behalf of an employer.

If the unaffiliated house would solely be liable for its hazing or alcohol-related actions, it is equally logical to not hold a national fraternity liable for the decisions made at the chapter level which primarily impact the local chapter. This is particularly true when the specific chapter is but one of

hundreds affiliated with the national organization, not to mention that the local decision contravenes the national Fraternity's policies.

And again, the liability-causing activity is not the pledging activity, it is the incorporation of hazing and alcohol into pledging. The national fraternity garners no benefit from hazing, and guides the chapters to avoid it.

Second, opening the door to vicarious liability in this matter will leave unanswered other questions. For instance, would a decision by two active members, not officers of the chapter, to haze a single pledge constitute an action taken for the benefit of the national fraternity? What if the two active members are the house president and the rush chairman? At what point is the line drawn between acting on behalf of themselves or the national fraternity?

Finally, the court certainly recognizes that this action is rooted on the criminal nature of the Hazing Act, 720 ILCS 5/12C-50. Plaintiff bases its negligence actions based on violations of that act by Chapter members.

Yet even though the Act is clearly designed to penalize people who haze students, it does not contemplate penalties (criminal or civil) for the "group, organization, or society" into which the victim sought induction or admission. When the perpetrating person violates the written policies of

the group, particularly in the absence as here of any alleged evidence that the organization sanctioned or ratified the hazing, logic dictates that it cannot be an act taken on behalf of the organization. The Act's punishment resides solely with the person on whose "behalf" the hazing was undertaken, however jaded his conveyed benefit: the hazing defendant.

**B. The national Fraternity owes no direct duty to pledges of local chapters; its inability to exert day-to-day control over chapters prevents imposition of a direct duty of care.**

Plaintiff persists in arguing that the Fraternity owed a direct duty to care to David Bogenberger, once again based on its supposed (but unalleged) endorsement and encouragement of pledge hazing. *Brief, p. 27.* Although it is difficult to reconcile how a direct duty could exist when at the same time vicarious liability (necessarily flowing through the actual hazing individual members) isn't shown by the pleading, the direct duty assertion is addressed below.

Plaintiff is only able to make his argument by again equating pledging with hazing. Once that distinction is re-established, the assertion of a direct duty fails.

This lack of a direct duty is likewise rooted in the national Fraternity's basic inability to reasonably control the day-to-day operations of hundreds of chapters across the country. So while injury resulting from hazing may be foreseeable, the duty cannot be imposed because the national organization is simply unable to prevent local members from hazing activities without the imposition of essentially impossible burdens for the organization to meet.

As the opinion notes, foreseeability of injury is but one of several factors in determining the existence of a duty. A duty requires a person to conform to a certain standard of conduct for the protection of another against an unreasonable risk of harm. The question of duty in a negligence action should take into account the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden upon the defendant. *Kirk v. Michael Reese Hosp. & Med. Cntr.*, 117 Ill.2d 507, 526 (1987). The "basis for liability in a negligence action is not the mere fact of injury but that an injury has been caused by fault." *Teter v. Clemens*, 112 Ill.2d 252, 258 (1986).

**1. The likelihood of injury from the national fraternity's omissions are scant and tenuous.**

The complaint specifically alleges that the local Chapter members planned and executed the "Mom & Dad's Night," including the hazing and alcohol aspects. No Fraternity involvement is alleged, whatsoever. Additionally, the complaint's recognition of the Fraternity's anti-hazing policies puts the members' decisions as the sole potential cause of David Bogenberger's death, leaving no fault to the Fraternity.

Nor does plaintiff complain that the Fraternity's anti-hazing policies were too weak. An outright ban on hazing, as directed by the Fraternity, cannot be the cause of the injury here.

Essentially, plaintiff contends that the Fraternity could have "done more" to prevent hazing, without any indication what that effort would entail. And while those burdens are discussed below, the lack of control over day-to-day decisions of the chapters remains central to "likelihood of injury" inquiry.

Plaintiff must then persist in its equation of pledging and hazing to argue that "the national Fraternity encouraged and ratified the Mom & Dad's Night *pledge hazing event.*" *Brief, p. 29.* But even the concepts of encouragement and ratification indicate that others caused the injuries here.

Furthermore, such encouragement and ratification are not pled in the complaint.

The Fraternity's ability to discipline chapters does not create a duty either. To begin, that ability only comes into play after a chapter violates rules, not before. But furthermore, Illinois law holds that by issuance of its regulations and handbook, a university did not "voluntarily assume a duty to create a certain safe environment for its students which if properly performed would have prevented the injuries in this instance." *Rabel v. Illinois Wesleyan Univ.*, 161 Ill.App.3d 348, 357 (1987).

*See also, Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), providing a lengthy examination of why a student disciplinary regulation prohibiting the possession of alcohol on campus did not impose a duty on the college to protect the plaintiff.

Though *Rabel* deals only with allegations against the university, its reasoning is equally applicable here. Regulations do not create a custodial relationship; they only describe the likelihood of injury from actions constituting their breach, and thus the regulations seek to proscribe the actions that lead to foreseeable injury. 161 Ill.App.3d at 361.

Finally, the brief suggests that the social policy here has already been set, through the Hazing Act's criminal penalties. But again, those penalties are

assessed against the actor, not against the organization into which the victim aspires. Thus, the brief wrongly concludes that the legislature "found a duty on the part of all involved." *Brief, p. 32.*

**2. Placing the burden of day-to-day control over all chapters' pledging activities is unrealistic.**

Plaintiff tries to deal quickly with the burden factors in a duty analysis, but without success. The inquiry here is not whether "obeying the law is a burden" or that the only consequence would be saving pledges' lives. *Brief, pp. 33-34.* If it were that easy, every human act would carry a duty of care for any impacted person.

Instead, the appellate court correctly returned to the concept of control, and what a national Fraternity can reasonably undertake to ensure that its policies on hazing and alcohol are followed by one, or all, of its hundreds of local chapters. *Opinion,* ¶47.

In particular, the complaint lacks any allegation of fact to support the duty asserted. But even more, the complaint and brief ignore the actual burden involved in imposing the duty, as well as its consequences.

To accomplish to the task of "ensuring" the anti-hazing policies are followed, the national Fraternity would be required to, at the very least,

contact each chapter, every day, in order to receive an assurance that there was no alcohol in the house and that no hazing was taking place.

But could the report be trusted? Would the national fraternity need to station a monitor in each chapter house? Either option would be astronomically expensive – and at a cost that could only be passed on to the members of the fraternity.

The more likely consequence would be that a national fraternity would draw back its anti-hazing efforts, remove itself from any education or guidance on the topic, and leave the field to the local chapters to alone navigate. Splintering the fraternity system is not a desirable outcome.

## Conclusion

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

Respectfully submitted,

By: 

Eric W. Moch
Robert E. Elworth
HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100

Attorneys for defendants-appellees Pi Kappa Alpha Corporation, Inc. and Pi Kappa International Fraternity, Inc.

**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 8199 words.

Attorney

HeplerBroom, LLC
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 230-9100

Attorneys for defendants-appellees Pi Kappa Alpha Corporation, Inc. and Pi Kappa International Fraternity, Inc.