No. 120986

(Consolidated with 120951 and 120967)

IN THE SUPREME COURT OF ILLINOIS

GARY I. 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 inside cover*)

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

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

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and

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Defendants.

Points and Authorities

Status of Arguments

Plaintiff's brief - and by extension, the appellate court's opinion - understates the breadth of this court's 125 years of alcohol-related liability jurisprudence. "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" (*emphasis in the original*) (*Charles v. Seigfried*, 165 Ill.2d 2d 482, 486 (1995)), and "the General Assembly has preempted the entire field of alcohol-related liability." *Wakulich v. Mraz*, 203 Ill.2d 223, 231 (2003). Unless the legislature has authorized the cause of action, it cannot be sustained.

Plaintiff and the appellate court distinguish *Charles* and *Wakulich* on the reasoning that this court's decisions were limited to "social host liability" and that the fraternity was not acting here as a "social host." However, this court's holdings make clear that the legislative preemption for alcohol-related liability is complete, and there is no exception for those who choose to drink to join a fraternity or similar organization. The concept of a "social host" is not as narrow as plaintiff contends.

Further, the alleged existence of a criminal violation or coercion to drink has not compelled this court to waiver in its *stare decisis*-respecting opinions or create a "so-called exception" to its social host liability jurisprudence. In *Wakulich*, this court confirmed the legislature's preemption over the "entire

field of alcohol-related liability" despite the defendant's alleged criminal act of supplying a minor with alcohol and imposing peer pressure on her to drink. Neither a criminal violation nor coercion creates an exception to the bar against a 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.

Any expansion into common-law recovery for alcohol-related liability - even in whatever "limited" fashion is prayed for here – is so problematic that the legislature remains the best equipped branch of government to resolve the issues comprehensively. Or does this court open a group of teenage fraternity members to unlimited liability when the Dram Shop Act imposes capped damages on profiteering businesses?

Ultimately, the logic for this court's historical deference to the legislature remains in place. The bar against alcohol-related liability encompasses all that which the legislature has chosen not to enact.

Second, the plaintiff seizes on the similarities between his voluntary-undertaking allegations here and those found actionable in *Wakulich.* But plaintiff does not acknowledge the dramatic differences between the facts already discovered and alleged here and those in *Wakulich* – starting with the sheer number of defendants alleged to have acted in concert to take

complete and exclusive charge over David Bogenberger. And despite the significant discovery, resulting in five amended complaints, plaintiff's allegations still lack reference to any specific acts undertaken by members which caused David Bogenberger's death. Finally, the complaint lacks allegations that any such member's actions were taken within the scope of Chapter authority.

The appellate court decision must be reversed.

A. In the absence of legislative action, there can be no civil recovery for alcohol-related liability; this court has not limited its rulings to "pure social-host" circumstances.

The appellate court's opinion and plaintiff's brief differentiate their position from *Charles* and *Wakulich* by asserting those decisions were limited to "social host" liability, generally limiting the concept to, apparently, dinner parties and backyard barbeques. They insist that a fraternity is not acting as a social host when it serves alcohol to a pledge who feels pressure and must drink to the point of intoxication to join the chapter. Plaintiff summarily insists that *Charles* and *Wakulich* were "purely social host cases." *Brief, p. 18.* However, this court has not limited the concept of "social host liability" in the manner plaintiff suggests or the appellate court's opinion states.

This court has not restricted "social host liability"

to the narrow interpretation plaintiff suggests.

This court's pronouncements indicate a broader definition of "social host" than plaintiff describes. The *Charles* panel held that the "legislative preemption in the field of alcohol-related liability ***extends*** to social hosts who provide alcoholic beverages to another person." 165 Ill.2d at 491 (*emphasis added*). The holding envisions preemption as being broader than just what plaintiff dubs a "pure social setting." *Brief, p. 18.*

And in *Wakulich,* the court reviewed a fact pattern that certainly would not fall into the "pure social setting" plaintiff describes. That is, the two defendants there were alleged to have induced a 16 year-old girl to drink a quart of "highly alcoholic" Goldschlager liquor "by offering monies, by goading and applying great social pressure" on her. 203 Ill.2d at 226. One defendant was later convicted of contributing to the delinquency of a minor. 203 Ill.2d at 226. This certainly wasn't an idyllic "evening of dining and drinking with friends," to which plaintiff suggests the bar to social host liability is limited. *Brief, p. 20.* Nor did the 16 year-old girl enjoy the absence of "the critical social pressure element" plaintiff contends differentiates "an everyday social scenario" from the circumstances indicated in the Hazing Act. *Brief, pp. 31, 32.*

Neven dealing with those less-than hospitable social circumstances, the *Wakulich* opinion still flatly rejected the plaintiff's prayer for a departure from *Charles* by recognizing that the legislature has preempted "***the entire field*** of alcohol-related liability" in. 203 Ill.2d at 231 (***emphasis added***). After yet another review of the controlling case law and public policy, the *Wakulich* court declined to adopt "any form of social host liability." 203 Ill.2d at 230.

Plaintiff also favorably compares a fraternity pledge to an at-will employee, a person "particularly susceptible to instructions from those occupying a position superior to him, regardless of whether that instruction is direct or implied." *Brief, p. 31.* Yet even in instances when an employer has provided alcohol, another putative non-classic "social host" circumstance under plaintiff's definition, those claims for alcohol-related liability are likewise dismissed, without question, based on this court's historical rulings. *See, e.g., Martin v. Palazzo Produce Co.*, 146 Ill.App.3d 1084 (1986) (company owner shared a morning beer with minor employee); *Thompson v. Trickle*, 114 Ill.App.3d 930 (1983) (off-site free pizza and beer celebration after group met a sales goal); *Wienke v. Champaign County Grain Assoc.*, 113 Ill.App.3d 1005 (1983) (in-office drinks with customers).

But if the court were to adopt plaintiff's suggested "social host" definition, these cases were all likely decided wrong. At the very least, what would a circuit court do going forward with an allegation that the employee only attended an otherwise-loathsome holiday party because she felt she'd lose her job if she didn't? Or a picnic at the company owner's house where he offered him a beer in the driveway? Or, a dinner party celebrating a new manager, complete with a toast welcoming her? The circuit courts would reasonably be charged with weighing degrees of "peer pressure" to see if the case fit within plaintiff's prayed-for cause of action.

Wakulich recites a lengthy paragraph from *Charles* which describes similar questions that could arise in different circumstances if the "Pandora's Box of unlimited liability" was opened. 203 Ill.2d at 234-35. The court rightly declined to adopt social host liability that would result in a "flood of litigants" demanding such answers. *Id.*

Charles and *Wakulich* thus refute the underpinnings of *Quinn*, *Haben*, plaintiff's argument, and the appellate court's opinion that the preemption of alcohol-related liability is limited to a restricted, "pure" view of social

host liability.[1] Indeed, it is just as likely – if not compelled by comparison to the Dram Shop Act's purview – that a "social host" is definable as anyone not engaged in the sale of alcoholic beverages.

Legislative preemption of "the entire field of alcohol-related liability" encompasses the common law liability recognized in *Quinn, Haben* and by the appellate court in this case because excessive drinking of alcohol (as an alleged requirement of fraternity membership) is an essential element of the plaintiff's claim.

Legislative silence is not acquiescence

to claims for civil alcohol-related liability.

Finally, plaintiff's brief provides arguments about how, despite the lack of new legislation authorizing social host liability, the legislature's inaction somehow provides a presumption of acquiescence for civil actions like those allowed in *Quinn* and *Haben*. This argument fails on several fronts.

First, in *Wakulich* this court detailed several legislative bills introduced after *Charles*, all of which failed, that would have imposed liability upon persons who supply alcoholic beverages to minors. The court viewed those

[1] *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).

deliberations not as inaction but "evidence that the legislature continues to debate and consider the merits and contours of any form of social host liability." 203 Ill.2d at 223.

Additionally, the legislature's decisions to not amend the Dram Shop Act or the Hazing Act in light of *Quinn* and *Haben* do not breathe the life into those decisions plaintiff suggests. *Brief, p. 23.* Neither decision, nor the appellate court's opinion here, treat the allowed cause of action as an "interpretation" of the Hazing Act, nor as a private cause of action under it.

In fact, plaintiff goes specific lengths to insist that the cause of action here is not a private cause of action under the Hazing Act, but is instead a common law action for hazing. *Brief pp.34-35.* The appellate courts are not "interpreting" the Hazing Act at all. *People v. Coleman*, 227 Ill.2d 426, 438 (2008), reciting rule that "when a court interprets a statute and the legislature does not amend it to supersede that judicial gloss, we presume that the legislature has acquiesced in the court's understanding of legislative intent."

Thus, the assertion that the legislature's inaction indicates acquiescence for an interpretation of the Hazing Act simply isn't supported by the common-law nature of *Quinn*, *Haben*, and the appellate opinion here. The appellate court's opinion here offers no interpretation of the Hazing Act;

instead, it interprets only existing case law, agreeing "with *Quinn* that this situation is distinguishable from the social host circumstances found in *Charles, Wakulich* and other social host liability cases." ¶29.

Plaintiff recognizes of course that in response to hazing incidents the legislature has chosen to ***only*** strengthen the criminal penalties for hazing; this alone refutes plaintiff's suggestion that not allowing the cause of action prayed for here would be a showing that hazing is "tolerated." *Brief, p. 27.* The legislature's intent is shown instead by its concurrent decision to strengthen the criminal penalties while it has not created a private cause of action under the Act that might have rendered this contested negligence case unnecessary. Nothing the legislature has done – or hasn't done – can reasonably be read as acquiescence in what is ultimately and solely a judicial creation, the common-law "so-called exception" to the long-recognized rule against social host liability. *Wakulich,* 203 Ill.2d at 239.

B. The legislature remains in the best position to weigh factors involving social host liability.

Plaintiff does not counter this court's repeated statements that "any decision to expand civil liability of social hosts should be made by the legislature." *Wakulich,* 203 Ill.2d at 232. The court's reasoning is to avoid law in a "confused, disorderly state" caused by a case-by-case, fact-specific

judicial expansion of the common law, the very thing done by *Quinn, Haben,* and the appellate court's opinion. *Charles,* 165 Ill.2d at 493-94.

See also, Cunningham v. Brown, 22 Ill.2d 23, 30 (1961), explaining "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.

In particular, plaintiff offers no direction on how the court, if it adopted the prayed-for social host liability exception, should implement the decision from a damages perspective. The *Wakulich* opinion, for instance, asks the question to which plaintiff offers no response:

> *Should the liability of social hosts be unlimited, or subject to the same limitation applicable to liquor vendors?*[2]

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[2] The Dram Shop Act would limit damages for a 2012 injury to $62,961.47 for a personal or property injury; and $76,952.91 for loss of means of support or society. 235 ILCS 5/6-21. *See,* https://illinoiscomptroller.gov/agencies/statutorily-required-reporting/dram-shop-liability-limits-2005-2017/

203 Ill.2d at 236. Plaintiff's silence leaves this court again facing the questions which have always been deferred to the legislature. In the absence of a compelling basis, these questions should be left to the legislature, as has been done for 125 years. "The existence of any legislative remedy, albeit limited, does not require the courts to recognize an additional or expanded remedy." *McKeown v. Homoya*, 209 Ill.App.3d 959, 962 (1991), *citing Cunningham*, 22 Ill.2d at 30.

C. The complaint does not state a cause of action for a voluntary undertaking by Chapter members by failing to identify members, their actions, or a causal connection to David Bogenberger's death.

Plaintiff still has not established that the complaint states a cause of action for the members' voluntary undertaking relative to David Bogenberger. The pleading's inability to identify the persons involved, the ones who actually voluntarily undertook the care and whose negligence caused the death, mandated dismissal. And all of these consecutive complaints were drafted and filed with the assistance of significant discovery. The circuit court was correct in its dismissal ruling.[3]

[3] The Chapter joins and adopts the Joint Reply Brief of Defendants-Appellants on the voluntarily undertaking issue.

The complaint must allege the defendants took "complete and exclusive charge" of David Bogenberger to state a claim.

But first, plaintiff suggests that Illinois law does not require that a defendant be alleged to have taken "complete and exclusive charge" of the injured person, suggesting the Chapter misreads *Wakulich*. *Brief, p. 43.* Plaintiff appears to argue instead that "complete control" is the standard (*p. 41*), and calls the distinction "critical." *Brief, p. 43.*

This court reviewed the voluntary undertaking section of the *Wakulich* decision in *Bell v. Hutsell*, 2011 IL 110724, affirming that the claim fell outside the rule against social host liability. ¶17. But the *Bell* opinion continues, "What was critical to this court's disposition in *Wakulich* were allegations that 'defendants effectively took complete and exclusive charge of Elizabeth's care after she became unconscious.'" ¶18. The *Wakulich* court found that defendants had "assum[ed] a duty to the helpless Elizabeth, pursuant to section 324 of the Restatement (Second) of Torts §324, by their affirmative actions, taking 'complete and exclusive charge of her care after she became unconscious.'" ¶18. (*internal citations omitted*)

Plaintiff incorrectly concludes, then, that the voluntary undertaking standard does not require an allegation that the defendants took "exclusive and complete charge" of the unconscious person.

Simply mirroring the Wakulich allegations does not rescue the inadequate voluntary undertaking pleading.

Plaintiff suggests that because the allegations here "track" those in *Wakulich*, they adequately state a cause of action for voluntary undertaking on the part of the Chapter members. *Brief, p. 39.* This argument does not reflect the more significant differences between this case and *Wakulich.*

First, *Wakulich* involved just two readily-identifiable defendants, in their home, who had allegedly taken control of just a single person. The circumstances here are significantly more complex, wherein 27 members are alleged to have taken exclusive and complete charge over not just David Bogenberger but, one presumes, the other pledges who likewise were insensate around the fraternity house. The similarity between the cases ends after the over-ingestion of alcohol.

Furthermore, plaintiff cites to pre-event meetings and planning in an effort to establish that the 27 members took control over all of the pledges after the event, when they had become inebriated. *Brief, pp. 37-38.* But there is no allegation that the 27 members participated in the event's planning ***or*** the post-event decisions about what to do on behalf of the inebriated pledges.

In order to plead the voluntary undertaking claim, plaintiff had to set forth specific facts that showed the members took substantial steps in performing their undertaking. *Bell*, 2011 IL 110724, ¶26. Yet the fifth amended complaint remained devoid of allegations of specific affirmative acts of substantial performance undertaken by any individual defendant to support a claim that the 27 members somehow collectively took complete and exclusive control of decedent while he was unconscious. Plaintiff's brief offers no more basis to support the allegations than the complaint itself.

Plaintiff's brief subsequently downplays the discovery obtained during the pleading process (*p. 40*), but the unusual and remarkable benefits of it are displayed in the brief's appendix. That is, the appendix includes two statements given to police, detailing members' activities throughout the event. In just the seven pages of police investigation reports (part of thousands of pages of investigation materials produced in discovery), the specific actions of numerous members are detailed. They also dispel the brief's suggestion that all members were acting "in concert" or "pursuant to a common design," as the reports display disparate activities across the fraternity house. Plaintiff is ultimately left without an explanation why the complaint continues to lump the members together under "on information and belief" allegations.

When in the two instances the complaint connects action to a specific member (the availability of a breathalyzer and placing the decedent in a bed), the complaint falters for yet another reason: those actions are not alleged to have increased the risk of harm to David Bogenberger. And contrary to plaintiff's argument, the failure to plead causation, as a defense to the complaint, has not been forfeited before this court. *Brief, p. 40.*

See, Bell, 2011 IL 110724, ¶21, holding, "It is well settled that where the appellate court reverses the judgment of the circuit court, and the appellee in that court brings the case before this court as an appellant, that party may raise any issues properly presented by the record to sustain the judgment of the circuit court." *Bell* thus allowed a similarly-situated defendant as the Chapter here to raise a proximate cause defense to a claim for voluntary undertaking in an alcohol-related death case, even though the argument had not been presented to the circuit court.[4]

[4] The same principle of law applies to the brief's contention that the "information and belief" and "lack of vicarious liability allegations" arguments are similarly forfeited in this court. *Brief, pp. 44, 47.*

The complaint's conclusory allegation that members were "acting within the scope of their authority in the planning and executing the event" does not state a claim for vicarious liability against the Chapter.

In addition to the pleading failures directed at the members, the complaint's attempt to plead vicarious liability against the Chapter similarly fails. In particular, the post-event decisions that form the basis for the voluntary undertaking claim are not alleged to have been undertaken by the Chapter's officers or pledge board members, acting on behalf of the Chapter.

Instead, the complaint alleges only that the decisions to place the pledges around the house or orient them in a certain way were made by "presently unknown active members." *R.C3036.* And so while plaintiff scoffs at the "*ad hoc* assembly of still-awake fraternity members" description of the members who determined whether to call 911 or where to place the pledges, that is ultimately what is alleged in the complaint. *Brief, p. 42.* Members did not "pop in and out" of their scope of authority, as the brief notes (*p. 42*); but, when the post-event decisions which are alleged to form the voluntary undertaking are isolated, the decision makers are merely "presently unknown active members," not Chapter officers or pledge board members.

As in *Wakulich*, the voluntary undertaking claim here "arises by virtue of" the decision to care for the decedent "after [he] became unconscious,

irrespective of the circumstances leading up to that point." 203 Ill.2d at 242. And because the complaint alleges only those voluntary efforts were undertaken by "presently unknown active members," the complaint fails to state a claim for vicarious liability for any of their negligent undertakings.

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 3421 words.

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