No. 110724

IN THE
SUPREME COURT OF ILLINOIS

JEFFREY HUTSELL AND SARA HUTSELL,	)	**Appeal from the Appellate Court of Illinois, Second District, No. 2-09-0577**
Defendants-petitioners	)	**There heard on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, IL**
v.	)	
JANET BELL, individually and as special administrator of The Estate of DANIEL BELL, deceased,	)	
Plaintiff-respondent.	)	**The Honorable David Hall, Trial Judge**

DEFENDANTS' APPELLATE REPLY BRIEF

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ORAL ARGUMENT REQUESTED

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I. SOCIAL HOST IMMUNITY APPLIES TO DEFENDANTS BECAUSE PLAINTIFF'S DAMAGES RESULTED FROM ALCOHOL USE.

Social host immunity applies to causes of action where alcohol use causes the damages at issue. *Charles v. Seigfried*, 165 Ill. 2d 482, 486 (1995) ("The rationale underlying the [social host doctrine] is that the drinking of the intoxicant, not the furnishing of it, is the proximate cause of ... the resulting injury"). In the present case, alcohol use does not merely *relate* to the undertaking at issue, it is *inseparable* from it. Under such circumstances, as detailed below, the alcohol use causes the damages at issue, not the undertaking, and therefore the alcohol use must serve as the proximate cause of the damages. Accordingly, the social host doctrine applies to undertakings inseparable from alcohol use, as in the present case, because the alcohol use serves as the proximate cause of the damages at issue. *Charles*, 165 Ill. 2d at 486.

A. *Simmons v. Homatas* requires an undertaking distinct from alcohol use

Curiously, plaintiff first relies upon this court's decision in *Simmons v. Homatas*, 236 Ill. 2d 459 (2010). There, plaintiff-administrator filed suit against a strip club after it forced one of its intoxicated patrons to drive away from the premises. *Simmons*, 236 Ill. 2d at 461-63. Though the club did not provide alcohol to its patrons or to the deceased, it did permit guests to bring alcohol to the premises and even provided mixers for drinks. *Simmons*, 236 Ill. 2d at 461-63.

The *Simmons* court initially revisited its prior decision in *Charles v. Seigfried* where it had held that the General Assembly had "preempted the entire field of alcohol-related liability." *Simmons*, 236 Ill. 2d at 469, citing *Charles v. Seigfried*, 165 Ill. 2d 482 (1995). Refusing to overrule the *Charles* decision, this court concluded:

> Although the *Charles* court used "alcohol-related liability" ... and "alcohol-induced injuries," ... [t]he court did not need to consider whether *actions of the defendant, independent of providing alcohol,* led to the third party's injuries. This distinction is relevant.

Simmons, 236 Ill. 2d at 470 (emphasis added). After making this distinction, the *Simmons* court analyzed circumstances under which a voluntary undertaking could result from alcohol induced injuries--circumstances distinctly different than those presented to the court in the present case. *Simmons*, 236 Ill. 2d at 471.

This *Simmons* court first addressed the voluntary undertaking in *Wakulich v. Mraz*, 203 Ill. 2d 223 (2003). There, the plaintiff alleged that defendants were negligent in providing alcohol to the sixteen-year-old decedent and were negligent in their voluntary undertaking to provide medical care for her sickness resulting from the alcohol consumption. The *Wakulich* court agreed with the trial court's dismissal of the claim that defendants negligently provided alcohol, but overruled the circuit court's dismissal of the claim that there was a negligently performed voluntary undertaking to render medical care. Examining its conclusion in *Wakulich,* the *Simmons* court emphasized: "[T]he fact that [defendants] served as social hosts was *irrelevant* to this claim. Instead, the defendants' liability arose by ... their voluntary assumption of a duty of care *irrespective* of the circumstances leading up to that point." *Simmons*, 236 Ill. 2d at 471.

In the present case, unlike in *Wakulich*, the circumstances involving alcohol were not "irrelevant" to the voluntary undertaking, but rather, were inseparable from the voluntary undertaking. Plaintiff alleges that defendants *failed to monitor alcohol use.* Unlike the undertaking in *Wakulich*, which was the negligent undertaking to render medical care, alcohol is part and parcel of the undertaking at issue. When a party voluntarily undertakes to render medical care, why the person needs medical care is

irrelevant. The person may need medical attention for reasons completely unrelated to alcohol, such as drowning, cardiac arrest, etc. In the present case, the cause of action does not work *without* alcohol consumption. Accordingly, liability cannot attach for a voluntary undertaking in the present circumstances, because alcohol consumption in the present case is not irrelevant to the undertaking; rather, it is essential to the undertaking.

The *Simmons* court then provided the further examples of *Lessner v. Hurtt* and *Harris v. Gower*, both cases involving bar owners found to owe a duty despite alchol-related circumstances. In *Lessner v. Hurtt*, a cocktail lounge owner was held liable for failing to protect a patron from the physical attack of an intoxicated customer. 55 Ill. App. 3d 195, 197 (1977). Though the *Lessner* court acknowledged the immunity granted to social hosts, the *Lessner* court concluded that the owner still owed a duty to protect its patrons while on its premises. *Harris v. Gower* involved an instance where bar employees placed an intoxicated patron in a vehicle at night which resulted in the patron freezing to death. 153 Ill. App. 3d 1035, 1038 (1987). The *Harris* court concluded that alcohol was significant to the plaintiff's cause of action only insofar as it was how the patron lost consciousness. 153 Ill. App. 3d at 1038. Analyzing this decision, the *Simmons* court concluded: "Again, liability arose not from providing alcohol, but from the bar employees' negligence in placing the decedent in peril." *Simmons*, 236 Ill. 2d at 472. Summarizing the cases, this court concluded that both served as examples of when "negligent conduct, *independent of serving alcohol*, could be properly pled." *Simmons*, 236 Ill. 2d at 472-73 (emphasis added).

Again, unlike the *Lessner* and *Harris* cases, in the present case the alleged undertaking must be related to the consumption of alcohol, because if no alcohol had

been consumed against the defendants' wishes, a negligent undertaking to *supervise* its consumption could not have transpired. Under such circumstances, the proximate cause of the injuries is the consumption of alcohol, not its furnishing. *Charles*, 165 Ill. 2d at 486.

The *Simmons* court next analyzed *Holtz v. Amax Zinc Co.*, 165 Ill. App. 3d 578 (1988). There, an employee became intoxicated at a company picnic and later drove away, causing a collision resulting in severe injuries to the plaintiff. *Holtz*, 165 Ill. App. 3d at 579-80. The plaintiff alleged that the employer was liable because it allowed the employee to leave knowing that the employee was intoxicated. Discussing why liability did not attach under such circumstances, the *Simmons* court reasoned: "the employer was not liable, as there was no further conduct, *beyond serving alcohol*, that exposed the employer to liability." *Simmons*, 236 Ill. 2d at 473 (emphasis added).

Analogizing this case to the facts before it, the *Simmons* court asked whether forcing an intoxicated patron to leave one's premises in a vehicle constituted a negligent performance of an undertaking. Answering the question in the affirmative, the *Simmons* court noted: "The [defendant's] duty does not arise from providing alcohol ... Rather, a duty under the facts arose later, following a series of actions taken by [the defendant] .. in response to discovering Homatas vomiting in the club's restroom." *Simmons*, 236 Ill. 2d at 473.

Unlike the undertaking in *Simmons*, the consumption of alcohol in the present case cannot be separated from the undertaking: undertaking to monitor *alcohol consumption*. As explained in the *Simmons* and *Lessner* cases, it cannot be said in the present case that alcohol was only relevant insofar as explaining the events leading up to

the undertaking. Alcohol consumption was the essential premise for the undertaking at issue.

Equally important to resolution of the present case is this court's description of when liability would *not* attach: "We do not hold today that restaurants, parking lot attendants or social hosts are required to *monitor* their ... *guests to determine whether they are intoxicated.*" *Simmons*, 236 Ill. 2d at 481 (emphasis provided). Plaintiff now urges this court to do precisely what it refused to do in *Simmons*, namely, extend liability to individuals who failed to monitor their guests' intoxication. Plaintiff may have provided a different legal label for defendants' activities, but the reasoning of *Simmons* still applies. The complaint cannot stand because the undertaking alleged is not distinct from alcohol use.

B. Case law precludes finding a cause of action arising from alcohol-centered voluntary undertakings.

Plaintiff echoes the appellate court's statement that defendants failed to cite to any decision that refused to impose liability in cases even where the defendant did not actually serve or provide alcohol. (Res. Brf at 12). To the contrary, defendants cited three cases discussed below where the court refused to impose liability for an alcohol-related action where the defendant did not actually serve the alcohol, as well as a fourth case where the sale of alcohol was explicitly deemed irrelevant to the court's decision to immunize the defendant from liability. True enough, defendants have not found and have therefore not cited an Illinois case addressing the precise alleged cause of action before this court. Nevertheless, defendants in their brief to the appellate court cited extensively to Illinois decisions standing for the proposition that imposing liability for the supervision

or monitoring of alcohol use, regardless of how one labels such a cause of action, is not permissible.

For instance, In *Richardson v. Ansco, Inc.*, 75 Ill. App. 3d 731 (1979), the plaintiff sought the recognition of a common law cause of action in negligence against an employer who "allowed" an employee to become intoxicated at work, knowing that the employee would be driving home. 75 Ill. App. 3d 731 (1979). In refusing to recognize such a cause of action, the court stated that any extension of liability for damages *arising* from intoxication must come from the legislature, not the courts, and that the Dram Shop Act provided the only remedy available to an Illinois plaintiff seeking to recover such damages. Significantly, the *Richardson* court refused to impose liability on this employer even though the plaintiff did not allege the sale or gift of alcohol. *Richardson*, 75 Ill. App. 3d at 732; *Miller v. Moran*, 96 Ill. App. 3d 596, 599 (4th Dist. 1981) (interpreting *Richardson*). Just as in the present case, the *Richardson* defendants merely failed to monitor alcohol consumption. Nevertheless, the court concluded that the damages from such an action would "result[] from alcohol consumption" and therefore refused to extend liability in such a situation. *Richardson*, 75 Ill. App. 3d at 732.

The appellate court in the present case distinguished *Richardson* in a questionable fashion by determining that the *Richardson* defendants who *permitted* alcohol consumption, but not defendants who *monitored* alcohol consumption, qualified as social hosts pursuant to *Cruse v. Aden*, 127 Ill. 231, 239 (1889). The appellate court began its path to this odd conclusion by defining a social host as "one who in his own house or elsewhere gives a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness." *Bell v. Hutsell*, 402 Ill. App. 3d 654, 658 (2010), quoting *Cruse v. Aden*, 127

Ill. 231, 239 (1889). Defendants here were therefore not social hosts, according to the appellate court, because "they did not supply the alcohol that Daniel consumed to the point of impairment." *Bell,* 402 Ill. App. 3d at 660. Later in its opinion, however, the appellate court's definition apparently evolved because the court without explanation concluded that defendants were not social hosts because they did not "supply the alcohol, store the alcohol, or affirmatively permit its consumption." *Bell,* 402 Ill. App. 3d at 660.

Neither the *Bell* court, nor plaintiff in her response brief, provides any explanation as to why actively permitting alcohol consumption confers social host immunity but supervising alcohol consumption does not. Reason, logic, and common sense demand the conclusion that there is no substantive difference between the two. The clear subject of *both* activities involves *alcohol consumption.* In fact, one could more aptly describe the activities defendants allegedly engaged in as "actively permitting" alcohol consumption. For instance, plaintiff alleges that party goers drank alcohol in full view of defendants, that empty alcoholic beverage containers were readily visible in the house, that the odor of beer permeated the home, and that partygoers carrying cardboard boxes of beer and hard liquor were in plain sight of defendants . (Res. Brf. at 8-9).

Therefore, whether the operative phrase utilized by plaintiff's cause of action is "actively permitting" or "negligently supervising," alcohol consumption can not be separated from the cause of action and thereby serves as the cause of the damages at issue. The holding in *Richardson* applies equally to the present case as a consequence: "Liability for damages *arising* from intoxication must come from the legislature, not the courts, and the only remedy available to an Illinois plaintiff seeking to recover such damages is an action under the Dramshop Act." *Richardson,* 75 Ill. App. 3d at 732.

In *Zamiar v. Linderman*, 132 Ill. App. 3d at 886, 887 (1982), a minor plaintiff injured himself by tripping on a rug after becoming intoxicated from beverages sold by the defendants' son. In pleading, the plaintiff did not allege that the furnishing of alcohol led to his injuries, but rather, the "failure to supervise alcohol after its consumption was 'permitted, assisted or allowed.' " *Zamiar*, 132 Ill. App. 3d at 887. Reviewing plaintiff's allegations, the *Zamiar* court noted that the plaintiff was attempting to get around the "myriad of cases prohibiting social host liability by contending that this court should enunciate a new common law duty of such hosts to 'supervise' intoxicated guests." *Zamiar*, 132 Ill. App. 3d at 890. The *Zamiar* court therefore held preemption precluded this new "common law duty of ... hosts to 'supervise' intoxicated guests." *Zamiar*, 132 Ill. App. 3d at 889-890. The *Zamiar* court clearly saw through the ruse, also attempted here by plaintiff, that the furnishing of alcohol is meaningfully different from its supervision.

In *Coulter v. Swearingen*, 113 Ill. App. 3d 650, 652-54 (1983), the plaintiff alleged: (1) that a minor could be held liable for giving alcohol to another minor resulting in damages to a third person, and (2) that liability could attach to the parents of such a minor for *permitting* such consumption by negligently storing alcohol in an accessible location. In addition to refusing to extend liability to the minor in question, the *Coulter* court refused to extend liability to the parents who had not *given or sold* the alcohol at issue. *Coulter*, 113 Ill. App. 3d at 652-54. In so holding, the court reasoned that "[o]ur courts have throughout its history consistently held that [the Dramshop Act] confers the only civil remedies available for injuries and harm *resulting* from alcohol" and that "any extension for damages *arising* from intoxication must come from the

legislature itself." *Coulter*, 113 Ill. App. 3d at 652-54. Again, as was the case here, the two legal theories put forth in *Coulter* both concerned injuries resulting from alcohol and the only remedy was the Dram Shop Act.

In *Heldt v. Brei*, 118 Ill. App. 3d 798 (1983), the plaintiff brought suit against homeowners whose son held a party where he sold alcohol to guests. In an attempt to circumvent the civil immunities attached to social hosts, the plaintiff alleged the parents failed to *supervise* their son's party and negligently entrusted the premises to their son. Rejecting this argument, the *Heldt* court observed:

> It is the *drinking of liquor, not its sale*, which is the proximate cause of intoxication. Although plaintiff urges that the focus of count IV is on [the defendant's] failure to supervise the party rather than [the son's] sale or supply of the liquor, *the same reasoning would apply*. The [plaintiff's decedent's] intoxication was proximately caused by his drinking, *not by [the defendant's] failure to restrain his drinking*.

Heldt, 118 Ill. App. 3d at 801 (emphasis added and internal citations omitted).

Similar to *Heldt*, the present case concerns an attempt to state a cause of action involving the supervision of alcohol. However, as in *Heldt*, the cause of the intoxication resulting in injuries was the consumption of alcohol, not its supervision. Thus, just as the *Heldt* court concluded, so too should this court conclude that the injuries at issue were caused by alcohol consumption, not some ancillary undertaking wholly unrelated to alcohol, and therefore social host immunity attaches.

Coulter, Heldt, Richardson and Coulter stand for the proposition that injuries allegedly caused by an undertaking that does not merely *relate* to alcohol, but centers on alcohol will not stand. This is because the consumption of alcohol in such cases constitutes the proximate cause of the injuries. *Heldt*, 118 Ill. App. 3d at 801. Too, none

of the cases discussed above contained reasoning where the furnishing of alcohol constituted the sole factor stated by the court as a reason to confer social host status.

C. *Cruse v. Aden* does not support plaintiff's social host definition.

Plaintiff, similar to the appellate court, cites this court's decision in *Cruse v. Aden* to argue that the social host doctrine does not apply to defendants because they did not "give[] a glass of intoxicating liquor to a friend as a mere act of courtesy and politeness." (Res. Brf. at 13, citing *Cruse v. Aden*, 127 Ill. 231, 239 (1880)). In *Cruse*, this court determined that liability under the Dram Shop Act could not attach to an individual who gave liquor to another for social purposes rather than for profit. *Cruse*, 127 Ill. at 239. The *Cruse* court did not, however, address the circumstances presented here, namely, whether the social host doctrine applies to those who supervise but do not serve alcoholic beverages. Nothing within the *Cruse* decision suggests the court sought to provide a precise and exhaustive definition of individuals entitled to social host immunity or to exclude those who did not actively provide the drink. Indeed, the phrase "social host" does not even appear in the opinion.

Nearly a hundred years later, an appellate court revisited the same issue addressed in *Cruse*. In *Miller v. Owens-Illinois Glass Company*, 48 Ill. App. 412, 423 (1964), the court also concluded that the Dram Shop Act was meant to regulate those in the business of selling, distributing, manufacturing and wholesaling alcoholic beverages. *Miller*, 48 Ill. App. at 423. The Act was not, however, meant to regulate "the social drinker *or the social drinking of a group,*" according to the court. *Miller*, 48 Ill. App. at 423 (emphasis added). This holding suggests social host immunity applies not only to those who furnish alcohol, but to those who are part of a social *group* that consumes alcohol. In the present

case, though defendants did not furnish alcohol, plaintiff does allege they were intermingling with and overseeing a social group that consumed alcohol. (Res. Brf. at 6-9). Applying *Miller* to the present case suggests that civil immunity should attach to the defendants as a consequence.

In sum, the precedent detailed above recognizes voluntary undertakings for alcohol-*related* undertakings but not alcohol-*centered* undertakings. Here, however, alcohol use constituted an *essential and inseparable* element of the purported undertaking. The damages at issue, therefore, *resulted* from alcohol use, not its supervision. Under such circumstances, the alcohol consumption serves as a proximate cause of the damages and the cause of action is therefore preempted. Finally, this court's discussion in *Cruse v. Aden*, as to when the Dram Shop Act *does not* apply, does not constitute an *exhaustive* definition of a social host. Moreover, the *Miller* court's discussion of the same matter and its reasoning that the Dram Shop Act is not meant to apply to the social drinking of a group, invites the conclusion that social host immunity applies to defendants in the present case.

II. DEFENDANTS' ARGUMENTS ARE NOT WAIVED.

Plaintiff argues that defendants present new arguments before this court and that such arguments are therefore waived. (Res. Brf. at 18). It is well settled, however, that a party may raise an argument before this court not previously presented to the appellate court or the circuit court if the party lacked cause to do so. *In re R.L.S.*, 218 Ill. 2d 428, 237 (2006).

In *In re R.L.S.*, a party before the Supreme Court had prevailed with its dispositive motion before the trial court prior to facing a reversal by the appellate court. This court

held that the interpretation given to a case by the appellate court--one which had not been addressed by the trial court--permitted the losing party on appeal to address the new interpretation before the Illinois Supreme Court. *In re R.L.S.*, 218 Ill. 2d at 264. This court concluded that prior to the appellate court's decision providing for its new caselaw interpretation, no party had any cause to address this novel interpretation. *In re R.L.S.*, 218 Ill. 2d at 264.

Such is the case here. Defendants, in their motion to dismiss plaintiff's second amended complaint, argued that the legislature has preempted establishing a cause of action for the negligent performance of a voluntary undertaking to monitor alcohol use. The circuit court agreed. In reversing the circuit court, the appellate court not only addressed and rejected defendants' arguments contained in their motion to dismiss, but provided its own reasons for reversal as well. In particular, the appellate court, albeit in a confused manner, asserted that plaintiff's allegations may fit within the Restatement's definition of a voluntary undertaking. *Bell*, 402 Ill. App. 3d at 657-58 (after examining Restatement § 323 the court stated: "For purposes of our discussion, without actually deciding, we assume the complaint pleads a voluntary undertaking"). It stands to reason that defendants can examine this new legal theory crafted by the appellate court--liability for the negligent monitoring of alcohol consumption--to determine whether it contradicts existing precedent and meets the necessary elements of an undertaking under the Restatement as the appellate court implied. *In re R.L.S.*, 218 Ill. 2d at 264.

Further, it is well settled that an appellate court may affirm or reverse a trial court's ruling based upon any reason supported by the record. *Canada Life Assurance Co. v. Salwan*, 353 Ill. App. 3d 74, 79 (2004) ("What is before us on review is the circuit

court's judgment, not the reasoning of the court"). Accordingly, the appellate court is not bound by the arguments raised by the parties before the trial court or even by the arguments contained in the party briefs before it on appeal. Thus, it naturally follows that parties may allege errors made by the appellate court that were not previously presented or even contemplated by the parties. To hold otherwise, as plaintiff now urges, would require this court to adopt the curious position that errors made by a reviewing court involving arguments not previously presented by the parties could never be addressed before the Illinois Supreme Court. The absurdity of such a position is self evident.

Lastly, while it is true that waiver may bar a party from making an argument, such a bar certainly does not apply to this court. *In re D.F.*, 208 Ill. 2d 223, 238-39 (2003) (the rule of waiver is a limitation on the parties and not on the court). Moreover, this court has an obligation to guide and develop the common law in accordance with reason and common sense. See, e.g. *Cravens v. Inman*, 233 Ill. App. 3d 1059, 1074 (1991) ("Our common law, which is of judicial origin, is comprised of broad, flexible principles that find their source in fundamental values of justice, logic, and common sense, and is adapted by the judiciary according to the changing demands of our society"). Thus, assuming, *arguendo,* that defendants did waive some of their arguments, such a waiver should not and cannot stop this court from analyzing new arguments in its endeavor to fashion law reflective of "justice, logic, and common sense." *Cravens*, 233 Ill. App. 3d at 1074.

III. PLAINTIFF IMPROPERLY PLED A VOLUNTARY UNDERTAKING

Plaintiff in her brief asserts its cause of action qualifies as an undertaking under either Restatement §§ 323 or 324. (Res. Brf. at 20). This argument must fail, however,

because essential elements under these sections have not been pled in the instant case, namely, that: defendants undertook a duty to Bell; defendants increased the risk of harm to Bell; or Bell was in a helpless state when defendants' alleged undertaking transpired. These missing elements are addressed in turn.

A. Defendants owed no duty to Daniel Bell pursuant to the Restatement.

The law is unequivocal: a duty is limited by the extent of the undertaking. *Doe v. Big Brothers Big Sisters of America,* 222 Ill. 2d 422 (2005). In the present case, defendants are alleged only to have made a promise *to their son* to monitor the party for alcohol consumption. They therefore only owed a duty to him and not Bell. Plaintiff now argues that the supervision activity by defendants undertaken on their son's behalf created a duty to all the party goers as well. (Res. Brf. at 21). Plaintiff fails to cite any case law for this proposition and therefore has forfeited this argument. *La Salle Bank, N.A., v. DeCarlo*, 336 Ill. App. 3d 280, 287 (2003) ("It is well settled that the failure to cite authority in support of an argument waives the issue").

Waiver aside, plaintiff's argument directly contradicts this court's practice of construing voluntary undertakings in a narrow fashion. *Jakubowski v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d 627, 641 (2002). Such is the case because public policy favors narrow constructions of undertakings. *Jakubowski,* 327 Ill. App. 3d at 641. Pursuant to plaintiff's theory, defendants owed a duty to individuals who neither saw defendants' supervisory activity or were even aware of defendants' promise to their son. This is so, according to plaintiff, because the supervision of all the party guests was required for defendants' undertaking to their son. (Res. Brf. at 21). Similarly troubling, defendants, according to plaintiff's theory, owed a duty to all individuals at the party

regardless of whether defendants knowingly made a promise to these individuals to supervise their activity. In no way does such a rule constitute a "narrow" construction of an undertaking. The plain language of Restatement § 323 undermines plaintiff's theory:

> One who undertakes, gratuitously or for consideration, to render services to *another* which he should recognize as necessary for the protection of the *other's* person or things, is subject to liability.

The language of the Restatement quoted above plainly requires a specific individual or individuals to serve as the object of a defendant's undertaking. Suggesting that parties can haphazardly fall into an undertaking with others contradicts the Restatement's plain language on the matter. Though plaintiff clearly engaged in a strained analysis to reach a duty owed by defendants to Daniel Bell, courts need only make reasonable inferences from allegations; they need not strain to find the necessary elements of a cause of action. *Elizondo v. Ramirez*, 324 Ill. App. 3d 67, 78 (2001) ("A court need not strain to adduce some remote factual possibility that will defeat the motion").

Finally, public policy is a consideration in any duty analysis and for the reasons set forth in section D. *infra*, public policy strongly disfavors the extension of liability to defendants in the present case.

B. Defendants' alleged acts or omissions did not increase Bell's risk of harm.

In an attempt to circumvent the reliance requirements in Restatement § 324, plaintiff now states that Restatement § 323 does not contain a reliance component. Assuming, *arguendo*, that this section does not require reliance, plaintiff's allegations still fail to show how defendants' alleged negligently performed undertaking *increased the risk of harm* to Daniel Bell, an explicit requirement of Restatement § 323. This court has adopted section 323 of the Restatement to establish the circumstances in which a

negligent voluntary undertaking occurs. *Wakulich v. Mraz*, 203 Ill. 2d 223, 243-45 (2003). This provision of the Restatement provides one who voluntarily undertakes to render necessary services to another "is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, *if* * * * his failure to exercise such care *increases the risk of such harm.*" Restatement (Second) of Torts § 323, at 135 (1965) (emphasis added). Plaintiff does not allege that anything done or not done by defendants increased the risk of harm to Mr. Bell. Neither can this be implied.

Unlike in *Simmons*, the defendants in the present matter did not *force* Bell to leave their premises in an intoxicated state. Nor, for that matter, did defendants *encourage*, *urge*, or *require* Mr. Bell to drink to the point of intoxication. Nor did they *make* or even *suggest* to him that he drive away drunk as was the case in *Simmons*. No alleged facts show that defendants' purported undertaking to monitor alcohol use had any bearing on Bell's decision to drive while intoxicated. Daniel Bell, an adult, is not alleged to have made this *decision* as a result of any act or omission by defendants, or by any other individual at the party, for that matter. Accordingly, a vital element in an undertaking pursuant to Restatement § 323 remains glaringly absent from plaintiff's pleadings.

C. Plaintiff has not pled that Bell was in a helpless state.

Plaintiff has failed to plead an undertaking pursuant to Section 324 as well. Nowhere within the allegations does plaintiff state or infer that Bell was in a helpless state--physically, mentally, or otherwise--when defendants' alleged undertaking transpired. Though the appellate court and plaintiff chose to ignore this matter, whether

Daniel Bell was in a helpless condition when defendants' undertaking occurred constitutes a necessary element in a voluntary undertaking pursuant to Restatement § 324.

Contrast these facts with those in *Wakulich*, where the decedent, age 16, was deemed "helpless to adequately aid or protect herself" and the defendants had exercised complete control over her as a result. *Wakulich*, 203 Ill. 2d at 227. Elizabeth, therefore, met the "helpless" requirement of Restatement section 324. *Wakulich*, 203 Ill. 2d at 227.

Such is not the case here. Plaintiff put forth no factual allegations that Mr. Bell was anything other than of sound body and mind when the undertaking at issue transpired. Accordingly, plaintiff's attempt to fit the present case under Restatement § 324 necessarily fails.

D. Public policy strongly disfavors plaintiff's new cause of action

Plaintiff argues that the public policy of this state is found in its constitution, statutes, and the decisions of its courts, and that these sources do not support the proposition that Illinois is against creating a cause of action caused by negligently performing a voluntarily assumed duty regarding the monitoring, supervision, or inspection of alcohol use. (Res. Brf. at 30). Applying the appellate court's holding, however, invites the conclusion that had defendants merely *served* alcohol, no liability would have attached. This court seeks to avoid such absurd results, which undermine the social host doctrine. *Charles v. Seigfried*, 165 Ill. 2d 482, 494 (1995) ("To expose a social host to a much greater liability than the profiting liquor vendor is incomprehensible to us").

Moreover, legislative intent, which is relevant to a public policy analysis for duty purposes (*Charles*, 165 Ill. 2d at 482), can also be gleaned from the Illinois Responsibility Act, 740 ILCS 58/5(b)(I). In this act, the legislature, in response to *Wakulich*, created a cause of action for a person, injured by an intoxicated person *under the age of 18*, against an adult who furnished the alcohol to the minor. 740 ILCS 58/5(b)(I). In other words, the legislature specifically chose to create liability only where the intoxicated tortfeasor *is under 18*. It created no cause of action for a person who, like Mr. Bell, was 18 or older, especially where it is the intoxicated adult who is claiming damages. Essentially, the appellate court's decision in this matter expresses a policy the legislature expressly declined to adopt, namely, enabling *adults* between the ages of 18 to 21 to hold liable those individuals who participate in their consumption of alcohol.

Similar insight exists in the legislature's consideration of a bill extending civil liability to those who merely *permitted* the consumption of alcohol to individuals between the ages of 18 and 21. (88th Ill. Gen. Assem., Senate Bill 1328, 1994 Sess., at 5). The legislature decidedly *rejected* extending civil liability under such circumstances. (88th Ill. Gen. Assem., Senate Bill 1328, 1994 Sess., at 5) Plaintiff's allegation, that defendants negligently performed a voluntarily assumed duty to monitor the consumption of alcohol, is essentially the same as alleging that defendants negligently *permitted* its consumption. It therefore strains credulity to argue that our legislature would deem it appropriate to extend liability to those who fail to monitor alcohol use when the legislature considered and unequivocally refused to attach liability to an activity so closely related to it.

Also, when deciding to fashion a new duty, courts analyze the propriety of attaching moral blame to misconduct. *Fugate v. Galvin*, 84 Ill. App. 3d 573, 577 (1st. Dist. 1980), citing Prosser, Torts § 53, at 327). Illinois has a policy of requiring drivers to take final responsibility for their decisions. *Fugate*, 84 Ill. App. 3d at 577. Indeed, this policy even predates this court's original fashioning of the social host doctrine. *Cruse*, 127 Ill. at 234 ("It was not a tort, at common law, to either sell or give intoxicating liquor to 'a strong and able-bodied man' "). The legal theory urged by plaintiff places moral blame for drunk driving on conscientious parents and other concerned adults who undertake to safeguard children against the perils of excessive alcohol use. However, the moral blame for such actions should rest solely with the adult who chooses to drive while intoxicated and harms himself and others as a consequence.

This new cause of action would constitute a shift in public policy with significant implications for societal interactions and relationships. The decision to make such a shift in public policy is one best made by the legislature, not the courts. *Charles*, 165 Ill. 2d at 493-94 ("The primary expression of Illinois public and societal policy should emanate from the legislature"), see also *Miller* 96 Ill. App. 3d at 600-01 ("A change in the law which has the power to so deeply affect social and business relationships should only be made after a thorough analysis ... best conducted by the legislature using ... public participation."). This court should avoid judicial activism that creates a policy clearly rejected by the Illinois legislature.

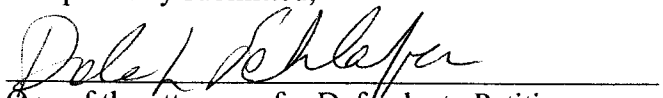
In conclusion, as stated in Section I *supra*, plaintiff's attempt to state a cause of action for the negligent performance of a voluntarily assumed duty to monitor alcohol use cannot stand because the alcohol use serves as the proximate cause of the damages, not

the purported undertaking. Social host immunity therefore applies. Notwithstanding such immunity, plaintiff failed to state an undertaking pursuant to Restatement §§ 323 and 324. This is because defendants did not undertake a duty *to Daniel Bell* to supervise alcohol consumption, defendants' purported undertaking did not increase the risk of harm to Bell caused by *his choice* to drive while intoxicated, and plaintiff alleged no facts intimating that an undertaking for Bell occurred while he was helpless. Finally, plaintiff's new legal theory clearly contradicts established public policy seeking to hold adults responsible for their decision to drive while intoxicated, the public policy indicated by the Illinois legislature's decision not to enact civil liability for defendants' purported acts and omissions, and the public policy of encouraging parents to safeguard children from injuries caused by alcohol use.

CONCLUSION

For all the foregoing reasons, defendants-petitioners respectfully request that this court reverse the appellate court's decision relating to counts I, II and III and affirm the trial court's order dismissing plaintiff's second amended complaint in its entirety.

Respectfully submitted,



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