NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 110328-U

Order filed July 14, 2011

NO. 4-11-0328

Modified upon denial of Rehearing October 13, 2011

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of MICHAEL BOONE, Deceased,	)	Appeal from
CONNIE BOONE, Individually; STEVEN KELTON;	)	Circuit Court of
TONYA ASHBY, an Individual and as Mother and Next	)	Macon County
Friend of TABITHA CARLISLE, a Minor Child; and	)	Nos. 08L26
BLAIR KILVER,	)	08L29
Petitioners-Appellees,	)	08L52
v.	)	08L55
VILLAGE III, INC., d/b/a SHORTY'S,	)	
Respondent-Appellant.	)	Honorable
	)	Albert G. Webber,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held:* The Illinois Dramshop Act does not preclude recovery under common-law theories of negligence sounding in (1) a voluntary undertaking, (2) concert of action, and (3) negligent entrustment.

¶ 2 This appeal comes to us upon the trial court's certified question pursuant to Supreme Court Rule 308(a). Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010). The court certified the following question:

> "Does or does not the Dram[]shop Act preclude recovery under the common-law theories of negligence sounding in:
>
> (a) Negligent breach of a voluntarily assumed duty;

(b) Concert of action; and

(c) Negligent entrustment

when employees of a dramshop confiscate an alleged intoxicated person's car keys due to the person's intoxication and later return the car keys to the alleged intoxicated person who then immediately causes a motor vehicle accident resulting in injuries to third persons?"

We allow the appeal pursuant to Rule 308(a) and answer the court's question in the negative.

¶ 3 Plaintiffs allege in their complaints, in addition to a violation of section 6-21 of the Liquor Control Act of 1934 (this section is also known as the Dramshop Act) (235 ILCS 5/6-21 (West 2008)), actions for (1) voluntary-assumed duty on the part of defendant through its agent and employee, (2) concert of action, and (3) negligent entrustment. All such allegations arise from facts alleged in their complaints that, in addition to providing Bryce Overlot alcoholic beverages, defendant was also negligent in having once taken Overlot's vehicle keys from him because he had become intoxicated. The keys were returned to him.

¶ 4 The issue raised by the certified question is resolved by *Wakulich v. Mraz* , 203 Ill. 2d 223, 241-42 (2003). There, our supreme court held that liability arising from the provision of alcohol by a social host is constrained by the scope of the Dramshop Act (235 ILCS 5/6-21 (West 2008)) as the legislature has preempted the field of alcohol-related liability. *Wakulich*, 203 Ill. 2d at 230 (quoting *Charles v. Seigfried*, 165 Ill. 2d 482, 486 (1995)). The court went on to explain that voluntary undertakings independent of the provision of intoxicating liquors are separately actionable, even in the context of the provision of intoxicating liquors. *Wakulich*, 203 Ill. 2d at 242.

See also *Simmons v. Homatas*, 236 Ill. 2d 459, 475 (2010) (a common-law cause of action for assisting and encouraging tortious conduct is not preempted by the Dramshop Act in context of providing intoxicating liquor). In *Wakulich*, the allegation was that the defendants who had provided alcohol to an underage girl voluntarily undertook to care for her after her intoxication and, once the duty was undertaken, an action for the breach of that duty could lie independent of the provision of the alcohol. *Wakulich*, 203 Ill. 2d at 241-42.

¶ 5 Here, it is alleged that an employee of defendant undertook the duty of preventing Overlot from driving while intoxicated by taking from him his vehicle keys. Her employer thereafter ordered her to give the keys back to Overlot. As in *Wakulich*, liability is sought to be imposed not for the provision of alcohol, which is limited to actions under the Dramshop Act, but rather for the additional duties assumed independent of the provision of alcohol.

¶ 6 We answer the question posed in the negative. That is, the Dramshop Act does not preclude recovery under common-law theories of negligence sounding in (1) negligent breach of a voluntarily assumed duty, (2) concert of action, and (3) negligent entrustment. Defendant argues in his petition for rehearing that *Wakulich* is inapposite because there the " 'defendants effectively took complete and exclusive charge of Elizabeth's care [(the victim)] after she became unconscious.' " *Wakulich*, 203 Ill. 2d at 243. While defendant accurately notes the court's statement in that case, the question of whether, as a matter of fact, the defendant, through his employees, effectively undertook such charge is a question for the jury to determine at trial. Hence, we deny the petition for rehearing.

¶ 7 The question having been answered, this cause is remanded for further proceedings.

¶ 8 Certified question answered; cause remanded.

¶ 9 JUSTICE COOK, dissenting:

¶ 10 The Dramshop Act provides a benefit to plaintiffs: no-fault liability. It also provides some benefits to defendants: limited liability and exclusivity of remedy.

¶ 11 Illinois has no common-law cause of action for injuries arising out of the sale or gift of alcoholic beverages. The legislature has preempted the field of alcohol-related liability, and any change in the law governing alcohol-related liability should be made by the General Assembly, or not at all. *Charles*, 165 Ill. 2d at 486, 651 N.E.2d 154, 156. The supreme court continues to adhere to its decision in *Charles* (*Wakulich*, 203 Ill. 2d at 236, 785 N.E.2d 843, 851) but has recognized the possibility of an independent cause of action, *i.e.*, voluntary assumption of a duty to care. *Wakulich*, 203 Ill. 2d at 242, 785 N.E.2d at 854. The voluntary assumption of a duty theory, however, is narrowly construed and generally requires an increase of the risk, reliance, or a change of position. *Bell v. Hutsell*, No. 110724, 2011 WL 1886891 (Ill. May 19, 2011).

¶ 12 In *Bell*, an 18-year-old consumed alcohol at a party at the homeowners' residence, after which he died as the result of a single-car accident. The voluntary undertaking counts alleged the homeowners had prohibited their son from allowing his guests to drink alcoholic beverages, and were aware of underage drinking, but then took no action. The supreme court dismissed the counts, reasoning that even if the homeowners commenced substantive performance of a voluntary undertaking, there was no increase of the risk of harm to the 18-year-old (*Bell*, slip op. at 13 ("defendants owed Daniel no duty to prohibit his voluntary possession or consumption of alcohol")), nor reliance or change of position on the basis of the homeowners' expressed intent. "[I]mposition of a duty and liability in this situation would only serve as a deterrent to those who would consider volunteering assistance to others" *(Bell*, slip op. at 12). The supreme court quoted from the

Restatement (Second) of Torts: " 'The fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. *** The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than he was in before the actor attempted to aid him.' " *Bell*, slip op. at 10 (quoting *Restatement (Second) of Torts* § 323, cmt. C, at 137 (1965)).

¶ 13 The supreme court in *Bell* distinguished *Wakulich* and *Simmons*, where voluntary undertaking counts were allowed. In *Wakulich*, a 16-year-old became unconscious after consuming a quart of Goldschlager. Defendant social hosts then effectively took complete and exclusive charge of the minor's care, failing to contact her parents, failing to obtain medical assistance, and preventing others from obtaining aid. *Wakulich*, 203 Ill. 2d at 243, 245, 785 N.E.2d at 855-56. The allegations in *Simmons* were that the club, which was not a dramshop, observed the person vomiting, ejected him from the premises, directed the valet service to bring his car, assisted him into the vehicle, and directed him to drive away from the premises. *Simmons*, 236 Ill. 2d at 473, 925 N.E.2d 1089, 1098. "[I]n each of those cases defendants' affirmative conduct, amounting to an assertion of control over an inebriated and significantly impaired person, increased the risk of harm to that person and/or created a risk of harm to others." *Bell*, slip op. at 13.

¶ 14 A dramshop cannot be liable where its agents have simply failed to take steps to prevent an intoxicated person from driving home. *Gustafson v. Mathews*, 109 Ill. App. 3d 884, 887, 441 N.E.2d 388, 390 (1982); *Holtz v. Amax Zinc Co.*, 165 Ill. App. 3d 578, 583, 519 N.E.2d 54, 57-58 (1988); *Simmons*, 236 Ill. 2d at 472-74, 925 N.E.2d at 1098-99. That is all we have here, where the employees of a dramshop took the allegedly intoxicated person's keys but returned them after he complained. The employees did not encourage the intoxicated person to leave; in fact, they

encouraged him not to. They did not provide "substantial assistance" in the departure; they simply did not prevent it. This case is very much different from *Wakulich* and *Simmons*. The voluntary-assumption-of-a-duty counts do not state a cause of action and should be dismissed. The trial court clearly acted properly in dismissing the concert-of-action and negligent-entrustment counts, which have no support in the law.