EVELEIGH, J., concurring in part and dissenting in part. I agree with parts I A, C, D, E, and II of the majority opinion. I also agree with the majority's decision to reverse the summary judgment rendered in favor of the defendants Delta Kappa Epsilon National Fraternity and its Delta Kappa Epsilon Phi Chapter (Phi Chapter)[1] and against the plaintiff, Marc Grenier, the administrator of the estate of Nicholas Grass. Therefore, I concur with most of the majority's decision. I disagree, however, with the majority's conclusion in part I B of the opinion wherein it states that "Phi Chapter owed no general common-law duty to protect Grass, which would obligate the fraternity to provide him with safe transportation for fraternity events." I further disagree that "the public policy of prohibiting hazing, as embodied in [General Statutes] § 53-23a, is inapplicable to the circumstances of the present case, and is, therefore, insufficient to support imposing a general duty of care upon Phi Chapter." Further, I disagree that "[n]one of the activities that the plaintiff alleged as having caused Grass' injuries involved conduct that falls within the scope of hazing activity as defined by § 53-23a." Therefore, I respectfully dissent from part I B of the majority opinion.

I agree with both the factual and procedural history presented in the majority opinion. I, however, present the issue differently than does the majority. In my view, the issue is not whether Phi Chapter owed a general duty to protect Grass, which would obligate the fraternity to provide him with safe transportation to and from fraternity events. I agree that a fraternity or any voluntary association should not be obligated to provide safe transportation to and from events that may be sponsored by the association. Rather, I would frame the issue as follows: Did Phi Chapter owe a duty to provide Grass with safe transportation from the fraternity activity under the facts of this particular case, wherein Grass was required to attend a mandatory fraternity function whose purpose was to cause sleep deprivation as part of the fraternity initiation policy? I would answer this question in the affirmative.[2]

Section 53-23a (a) (1) (B) defines hazing as "[r]equiring any activity that would subject the person to extreme mental stress, such as sleep deprivation or extended isolation from social contact . . . ." Further, § 53-23a (e) provides that "[t]his section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy."

As stated by the majority, the events that preceded the tragic accident were part of the pledging process referred to as "Hell Week, a weeklong series of events designed to push the pledges to their breaking point.

Included in these events were ongoing efforts by the fraternity members to keep the pledges awake every night during the week. Every year, Hell Week concluded with an off-campus search and rescue mission, during which a fraternity member would be captured by the pledges while the remaining members would try to locate their captured comrade, after which the fraternity members and the pledges would spend the rest of the evening socializing. Phi Chapter officers arranged for the search and rescue event in which Grass and his fellow pledges were expected to participate to take place in New York City beginning on the night of January 16, 2003." (Internal quotation marks omitted.)

I disagree with the majority's conclusion that none of the activities at issue herein involved conduct that falls within the scope of hazing activity as defined by § 53-23a. I understand that there is no claim of an intentional or reckless act in this case and that the statute criminalizes reckless and intentional conduct. While I believe that analysis would be appropriate if there were a claim of a per se in violation of the statute, I do not think we can dismiss the fact that the statute may well establish a public policy against hazing that is applicable to the facts of this case. Specifically, the facts of the present case involve an activity that caused sleep deprivation in the context of a fraternity initiation process. I note that the prohibition contained in the statute regarding the definition of hazing proscribes "any action which recklessly or intentionally endangers the health or safety of a person for the purpose of initiation, admission into or affiliation with, or as a condition for continued membership in a student organization." General Statutes § 53-23a (a) (1). It refers to "any action" instead of any person who recklessly or intentionally causes someone sleep deprivation. In my view, there can be no question that the events on the night of January 16, 2003, by Phi Chapter were designed to cause sleep deprivation as part of the fraternity admission process. As such, the ultimate result was to cause sleep deprivation. The labeling of the act as reckless or intentional may be important in any analysis of a claimed violation of the act in a criminal context.

Section 53-23a, however, demonstrates a public policy that any action that recklessly or intentionally causes sleep deprivation in a fraternity initiation setting constitutes hazing. It is a decision for the plaintiff and his attorney whether to ask the state to pursue criminal charges under the statute and to allege intentional or reckless action on the part of the fraternity defendants. The statute, however, specifically provides that "[t]his section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy." General Statutes § 53-23a (e). Therefore, I would conclude that an action in common-law negligence is not foreclosed when the activities of the members of the fraternity may be alleged to have been negligent,

but the result of those actions constituted reckless or intentional sleep deprivation and thus "hazing" in violation of this state's public policy as expressed in § 53-23a (a) (1) (B). Thus, I disagree with the majority's conclusion that we are "merely considering Phi Chapter's alleged negligent conduct in providing return transportation from a social fraternity event." Hazing did, in fact, occur because sleep deprivation was involved. Sleep deprivation was the primary goal of the activity. I further disagree that the "negligent transportation issues presented herein would be the same whether the fraternity event from which Phi Chapter provided transportation was a reenactment of the movie Animal House[3] that involved serious hazing activities, or was a group trip to a Habitat for Humanity event at which the fraternity members assisted in building a house for a low income family." In my view, a duty would be created in the Animal House scenario due to the hazing activities, whereas, there would not be a duty of providing safe transportation in the Habitat for Humanity scenario because of the absence of any hazing. Further, as set forth in the majority, I am not suggesting that we have to "consider whether imposing civil liability in common-law negligence for injuries resulting from hazing is consistent with the public policy attendant to criminalizing intentional or reckless hazing activities." Rather, I am suggesting that the public policy against hazing contained in § 53-23a may well apply to a situation wherein common-law negligence is alleged.

It is well settled that the existence of a duty under Connecticut law is determined from the particular factual circumstances that define the relationship between a plaintiff and a defendant in the context of the tortious conduct in question. "Duty is a legal conclusion about relationships between individuals, made after the fact . . . ." (Internal quotation marks omitted.) *Murdock* v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004). "The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." (Internal quotation marks omitted.) *Allen* v. *Cox*, 285 Conn. 603, 609, 942 A.2d 296 (2008). "[T]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." *Murdock* v. *Croughwell*, supra, 566. Any consideration of the first prong of the test involves an inquiry as to "the measure of attenuation between [the defendant's] conduct, on the one hand, and the consequences to and the identity of the plaintiff, on the other hand." *RK Constructors, Inc.* v.

Fusco Corp., 231 Conn. 381, 387, 650 A.2d 153 (1994); see also *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 115, 869 A.2d 179 (2005) ("The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . [In other words], would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" [Internal quotation marks omitted.]).

The operative complaint in this matter alleges, among other things, that the fraternity defendants: (1) failed to exercise reasonable care in selecting and approving Sean Fenton, a member of Phi Chapter, to drive attendees back from the fraternity event in New York City; (2) failed to act in a reasonably prudent manner to ensure the safe return of the individuals attending the event that was sponsored, arranged, sanctioned and/or approved by Phi Chapter; (3) failed to ensure that Fenton could safely operate the Chevrolet Tahoe used to transport the attendees and/or was not excessively fatigued; and (4) knew or should have known that Fenton was incapable of safely operating the Chevrolet Tahoe. In support of this claim, the plaintiff, in opposing the fraternity defendants' motion for summary judgment, submitted evidence, including expert testimony, describing: Fenton's sleep patterns and the resulting sleep deprivation caused by his participation in the fraternity events; Phi Chapter's responsibility for planning the event and designating drivers to transport participants; how Phi Chapter required Fenton as a driver; and how Phi Chapter required the event attendees to ride with Fenton in inclement weather. In my view, it is evident that an ordinary person in the fraternity defendants' position, knowing what they knew or should have known, would have anticipated that a car accident may have resulted from the circumstances existing at that time and should have anticipated that harm of the general nature that was suffered was likely to result. Therefore, I would conclude that the first prong of the test for a common-law duty has been satisfied.

The second prong to consider is whether judicial recognition of a legal duty would "be inconsistent with public policy." *Monk* v. *Temple George Associates, LLC*, supra, 273 Conn. 116. We have listed four factors to be "considered in determining the extent of a legal duty as a matter of policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 480, 823 A.2d 1202 (2003).

First, the normal expectations of the participants in the activity involved in the present case would be that the fraternity defendants would act in a manner to promote and protect the safety of the participants. The majority concludes that "because, in the absence of circumstances creating a special relationship between Phi Chapter and its members, Phi Chapter had no obligation to ensure the members' safety by providing any transportation to or from the search and rescue event, an expectation that Phi Chapter would provide safe transportation for the fraternity members, under the circumstances of the present case, is reasonable only because Phi Chapter voluntarily undertook to provide return transportation in the first place." See footnote 15 of the majority opinion. In my view, although I agree that Phi Chapter can be responsible because it voluntarily undertook to provide return transportation, the majority bootstraps its original conclusion that there was no obligation to provide safe transportation into a corollary rejection of the first prong, thereby negating any expectations that may have existed on the part of the participants. As I have indicated previously, it was the presence of the hazing activity that created the duty. I note that several of the allegations in the complaint relate to the actions of Phi Chapter in its failure to provide safe transportation from the event. Only one allegation relates to a failure to supervise transportation to the event. I agree with the majority that the provision of safe transportation should not, as a general rule, create a common-law cause of action against a voluntary association. Where, however, hazing occurs at an association's event, a duty arises and, therefore, the participants in the present case had the right to expect that Phi Chapter would provide a safe means of transportation upon their return trip.

As I indicated previously, § 53-23a makes hazing illegal in Connecticut and imposes fines for conduct falling within the statute's scope. In my view, the majority takes a far too restrictive view of the public policy underlying the statute when it suggests that it is limited to those actions caused recklessly or intentionally. Although it may be necessary to prove one of these elements in order to support a violation of the statute, § 53-23a certainly is not intended to limit relief available to victims of hazing, or to provide the exclusive means of vindicating such claims. The statute expressly reflects the opposite intention: "This section shall not in any manner limit or exclude prosecution or punishment for any crime or any civil remedy." General Statutes § 53-23a (e). The majority notes that the statute "does not create a civil cause of action where one does not exist." See footnote 14 of the majority opinion. Although this may be true, my disagreement with the majority is that the cause of action may already exist, in these circumstances, under our common law. If so, § 53-23a does not prevent a civil action to be instituted

for common-law negligence.

Indeed, in my view, it is counterintuitive to conclude that the legislature would make such a strong public policy statement against hazing in § 53-23a, yet limit that policy only to reckless or intentional actions. In my view, the more likely interpretation is that the legislature was proscribing only criminal conduct in the statute through the usage of the terms reckless and intentional. Its position against any hazing, however, is demonstrated by the fact that the statute "shall not in any manner limit or exclude prosecution or punishment for any crime or civil remedy." General Statutes § 53-23a (e). Does it make any sense that the legislature would proscribe hazing in the form of sleep deprivation for intentional or reckless activity, but suggest that hazing is not against public policy if it is only negligent conduct that causes the sleep deprivation? I do not wish to subscribe to such a construction of public policy.

Indeed, I note that, previously, we have taken an approach similar to the one I suggest herein. Specifically, in *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003), this court concluded that the Dram Shop Act, General Statutes § 30-102, did not provide the exclusive remedy against a seller for negligently furnishing alcoholic beverages because there was nothing in the language of the statute or in its legislative history to suggest that the legislature intended to occupy the field.[4] This court stated in *Craig* that "[t]he issue of whether to recognize a common-law cause of action in negligence is a matter of policy for the court to determine based on the changing attitudes and needs of society. In making such a determination, we are mindful that the law of torts involves the allocation of losses arising out of human conduct, and its purpose is to adjust these losses by affording compensation for injuries sustained by one person as a result of the conduct of another. W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 1, p. 6. It seems self-evident that the serving of alcoholic beverages to an obviously intoxicated person by one who knows or reasonably should know that such intoxicated person intends to operate a motor vehicle creates a reasonably foreseeable risk of injury to those on the roadways. Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care and therefore may be held liable in negligence." *Craig* v. *Driscoll*, supra, 339–40. This court noted in its analysis that the legislature had recognized the severity of the risks associated with the service of alcohol to persons not able to exercise reasonable judgment in General Statutes § 30-86 (b) (1), which provides in relevant part: "Any permittee or any servant or agent of a permittee who sells or delivers alcoholic liquor to any minor or any intoxicated person, or to any habitual drunkard, knowing the person to be such an habitual drunkard, shall be subject to the penalties of section 30-113." General Statutes § 30-113 provides

for a fine of not more than $1000 or imprisonment of not more than one year or both. Thus, in *Craig* v. *Driscoll*, supra, 314–15, this court affirmed the judgment of the Appellate Court that reversed the judgment of the trial court striking certain counts of the plaintiffs' complaint alleging negligent and reckless infliction of bystander emotional distress. It is clear that in *Craig*, we looked to a criminal statute, which, on its face, did not create a cause of action, as the basis of public policy to support recognizing a common-law negligence action. Further, unlike § 53-23a, there is no indication in either § 30-86 or § 30-113 that those statutes are not intended to limit the right of anyone to pursue any civil remedy.

Second, the public policy of encouraging participation in the activity while protecting the safety of participants supports the public policy considerations for imposing a duty of care. I agree with the plaintiff that: "[t]here is nothing about fraternity life that justifies any special exemption from ordinary rules of conduct"; "[e]ncouraging young people to join social organizations makes policy sense if the organization engages in socially [acceptable] activities"; and "the activities have social utility, if at all, only when due care is exercised."

Third, any concern about increased litigation is misplaced. The majority notes that "the plaintiff's argument that imposing a duty under these circumstances will not increase litigation because the duty here is simply an application of 'age-old common-law principles' that 'a social organization that has undertaken the responsibility for organizing, arranging and conducting an offsite social event' . . . has a duty to do so safely, actually highlights the fact that imposing a general duty of care for the safety of fraternity members in all fraternity activities certainly might increase litigation not only for injuries sustained in connection with all fraternity events, but also with members of all manner of voluntary associations. Indeed, if a voluntary association such as a fraternity has a general duty of care regarding the safety of the participants in all events, even those not designed to haze any of the participants, one could imagine that organizing and conducting any event on a wintry evening might lead to liability should participants encounter hazardous road conditions on the way to or from such an event. Moreover, imposing such a general duty upon the fraternity under the circumstances of the present case, where there are no allegations that the purpose of the event was to haze the participants, and no allegations that the injuries were caused by hazing, could also open up avenues of litigation for members of other voluntary associations who are injured while traveling to and from, or participating in, any variety of association events." See footnote 15 of the majority opinion. Again, if I supported the imposition of a general duty on the part of fraternities to provide safe transportation to and from any event, I

might share the majority's concern about an increase in litigation. I support, however, the imposition of a legal duty under the limited circumstances of this case wherein the fraternity activities clearly include hazing activities. Under these limited circumstances, I do not accept the floodgates argument. Indeed, if a fraternity is aware that it may be liable for the negligent conduct of its hazing activities, it may be more careful in the conduct of those activities which might result in a decrease in litigation.

Fourth, the majority attempts to distinguish the cases cited by the plaintiff by stating that they "are inapposite because they all strictly involve injuries arising from hazing activities." See footnote 15 of the majority opinion. Herein lies the crux of our disagreement. In my view, the injuries alleged in this case were the direct result of hazing activities, i.e., sleep derivation. Numerous cases from our sister states support the imposition of a duty in similar situations. In *Haben* v. *Anderson*, 232 Ill. App. 3d 260, 266, 597 N.E.2d 655 (1992), the Appellate Court of Illinois held that a sports club had a duty of care arising from alleged hazing activities that "had been conducted by the [c]lub members for a number of years and had become a 'tradition of, and a de facto requirement for, membership in the [c]lub,' and that the pressure to consume dangerous quantities of alcohol created a hazardous condition threatening the initiate's physical welfare." The court in *Haben* found a common-law duty had been violated, concluding that the harm to the plaintiff was foreseeable based on the history of hazing in the club and that "recognizing a cause of action in such a situation is consistent with the policy against embarrassing or endangering our youth through thoughtless or meaningless activity" as embodied by that state's statute banning hazing. Id., 265–66. The Illinois hazing statute, 720 Ill. Comp. Stat. Ann. § 120/5 (West 2010), defines hazing as follows: "A person commits hazing who knowingly requires the performance of any act by a student or other person in a school, college, university, or other educational institution of this [s]tate, for the purpose of induction or admission into any group, organization, or society associated or connected with that institution if: (a) the act is not sanctioned or authorized by that educational institution; and (b) the act results in bodily harm to any person."

Similarly, the Missouri Court of Appeals also concluded that the plaintiffs in a wrongful death action arising from initiation activities stated a cause of action under a common-law negligence theory. See *Nisbet* v. *Bucher*, 949 S.W.2d 111, 117 (Mo. App. 1997). In doing so, the court relied on the state's statute prohibiting hazing that "evinces a public policy" and is "the legislature's . . . [indication of] a social policy against embarrassing or endangering our youth through thoughtless and meaningless activity." (Internal quota-

tion marks omitted.) Id. The Missouri statute, 1994 Mo. Laws § 578.360 (2) (West 2011), defines hazing as follows: "[A] willful act, occurring on or off the campus of an educational institution, directed against a student or a prospective member of an organization operating under the sanction of an educational institution, that recklessly endangers the mental or physical health or safety of a student or prospective member for the purpose of initiation or admission into or continued membership in any such organization to the extent that such person is knowingly placed at probable risk of the loss of life or probable bodily or psychological harm. Acts of hazing shall include:

"(a) Any activity which recklessly endangers the physical health or safety of the student or prospective member, including but not limited to physical brutality, whipping, beating, branding, exposure to the elements, forced consumption of any food, liquor, drug or other substance or forced smoking or chewing of tobacco products; or

"(b) Any activity which recklessly endangers the mental health of the student or prospective member, including but not limited to sleep deprivation, physical confinement, or other extreme stress-inducing activity; or

"(c) Any activity that requires the student or prospective member to perform a duty or task which involves a violation of the criminal laws of this state or any political subdivision in this state." Thus, the Missouri Court of Appeals found that a public policy existed against hazing supporting a common-law negligence action, even though the policy was based upon a criminal statute that required a wilful or reckless act.

Further, in *Oja* v. *Grand Chapter of Theta Chi Fraternity Inc.*, 174 Misc. 2d 966, 968–69, 667 N.Y.S.2d 650 (1997), a New York Superior Court stated that hazing "assumes a degree of willingness by college youths to be bullied and humiliated in exchange for the social acceptance which comes with membership in a circle which, to the puerile, may seem alluring and even exalted. . . . [Pledges] however unwisely, trade their insecurities and free will for the promise of acceptance, and prestige, that fraternity membership appears to confer. A jury might find that the stoic acceptance of pain and discomfort by a pledge, as the price of admission to the fraternal mysteries, is not truly voluntary." (Citation omitted.) The New York statute prohibiting hazing, N.Y. Penal Law § 120.16 (McKinney 2009) provides: "A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury. Hazing in the first degree is a class A misdemeanor." N.Y. Penal

Law § 120.17 (McKinney 2009) provides that "[a] person is guilty of hazing in the second degree when, in the course of another person's initiation or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person. Hazing in the second degree is a violation." Thus, New York, because of public policy concerns underlying hazing, recognizes that, at least, questions of fact regarding responsibility and duty are appropriately left for the jury. The majority states that these cases from our sister jurisdictions are irrelevant because, in its view, this case involves safe transportation and not hazing. In my view, this case does involve hazing and the cases cited previously are directly on point.

Therefore, I would conclude that all of the public policy considerations support the imposition of a duty in this particular case which involved hazing activity. I agree with the majority, which cited the Restatement (Second) of Torts, § 315 (1965), that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the other which gives to the other a right to protection." (Internal quotation marks omitted.) When hazing is involved, however, in my view, § 53-23a creates a special relationship such that a duty of care is owed to those individuals who are involved in a fraternal initiation. Accordingly, I would allow the common-law negligence count to be presented to the jury.

Therefore, I respectfully dissent with respect to part I B of the majority opinion. I concur in all other aspects of the opinion.

[1] See footnote 2 of the majority opinion for a listing of the parties originally named as defendants in the present case. Because the claims against the other parties have been resolved or withdrawn, Delta Kappa Epsilon National Fraternity and Phi Chapter are the only remaining defendants, and I, like the majority, refer to them jointly as the fraternity defendants.

[2] The majority opinion indicates that this required fraternity event was the end of what the fraternity members referred to as " 'Hell Week.' " In my view, determining whether the activities on the evening of January 16, 2003, involved hazing requires a jury determination and should not be decided by this court on the basis of the deposition of Phi Chapter's president without the benefit of a trial on the facts.

[3] National Lampoon's Animal House (Universal Pictures 1978).

[4] I note that § 30-102 was amended by the legislature in response to our decision in *Craig*, however, the change in the statute did not affect the precedential value of the analysis contained therein. See Public Acts 2003, No. 03-91, § 1.