

COURT OF APPEALS, STATE OF COLORADO 2 E. 14 th Avenue Denver, CO 80202	14533 JS
District Court, County of Weld The Honorable Daniel S. Maus District Court Case No. 06CV81	2008 JAN -3 P 2:59
Petitioner-Appellant RAUL FLORES CANO (father) and OLIVIA CONCEPCION BERMUDEZ FLORES (mother), v. Respondent-Appellee, FIRESTONE LIQUORS, INC. and SYLVIA ABERLY (owner), SCOTT A. ABERLY (director),	^ COURT USE ONLY ^ Case No.
Attorney for Appellant: Attorney for Claimant Name: F. Lee Maes, Esq. Address: 1100 South Shoshone Street Denver, CO 80223 Phone No.: 303-922-0300 Fax. No.: 303-922-4882 Atty. Reg. # 12860 Email: fleelaw@yahoo.com	08 CA 19
NOTICE OF APPEAL	

Pursuant to C.A.R. 3, petitioner-appellants Raul Flores Cano, and Olivia Concepcion Bermudez Florez, by and through attorney, F. Lee Maes, hereby file this Notice of Appeal.

I. BRIEF DESCRIPTION OF THE NATURE OF THE CASE

(a) A general statement of the nature of the controversy.

This case arises out of a motor vehicle accident which took place just after 5:00 a.m. on February 9, 2005. Plaintiffs' son and daughter were traveling eastbound on Colorado Highway 52, when Tobias Sholes' vehicle struck their vehicle head-on. Mr. Sholes was driving under the influence of alcohol at the time. Both adult children died as a result of the collision. On February 3, 2006, Plaintiffs filed this action against Firestone Liquors, Inc. and its owners, contending that the liquor store and its owners should be held liable because Mr. Sholes and Michael Dewey, the passenger in Mr. Sholes' vehicle

at the time of the accident, had purchased alcohol from the store while intoxicated prior to the accident.

On March 14, 2007, the Court granted Defendants' Partial Motion to Dismiss Plaintiffs' second and fourth claims for relief based on negligence, negligence *per se*, and *respondeat superior*. The Court permitted Plaintiffs' first and third claims for wrongful death, C.R.S. §13-21-202, and liability under the Dram Shop Act, C.R.S. § 12-47-801, to proceed.

On September 11, 2007, Defendants filed an Amended Motion for Summary Judgment as to the two remaining claims. On September 26, 2007, Plaintiffs filed an Objection to Defendants' Amended Motion for Summary Judgment and Motion for Extension of Time to Obtain Affidavit Per Rule 56. Finally, on October 3, 2007, Defendants filed a Reply in Support of Motion for Summary Judgment.

The final order of the Court dismissed Plaintiffs' remaining claims and resulted in the trial, which was scheduled for February 4, 2008, to be vacated.

(b) The judgment order or parts being appealed and a statement indicating the basis for the appellate court's jurisdiction.

Petitioner appeals from the Court's final order dated November 20, 2007.

(c) Whether the judgment or order resolved all issues pending before the trial court including attorneys' fees and costs. Petitioners assert that the final judgment resolved all issues before the District Court. However, the Court's order did not address fees or costs. The Petitioners therefore rely upon **C.R.C.P. 59(b)** for filing their appeal.

(d) Whether the judgment was made final for purposes of appeal pursuant to C.R.C.P. 54(b). No further orders are necessary for purposes of appeal.

(e) The date the judgment or order was entered (if there is a question of the date, set forth the details) and the date of mailing to counsel.

Court entered an order on November 20, 2007, which was emailed to all counsel on November 20, 2007.

(f) Whether there were any extensions granted to file any motion(s) for post-trial relief. If so, the date of the request, whether the request was granted and date to which filing was extended. No extensions for post-trial motions were sought or granted.

(g) The date any motion for post-trial relief was filed. None.

(h) The date any motion for post-trial relief was denied or deemed denied under C.R.C.P. 59(j). Not Applicable.

(i) Whether there were any extensions granted to file any notice(s) of appeal. If so, the date of the request, whether the request was granted and the date to which filing was extended. No extensions were sought or granted.

II. AN ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL

Whether the court erred in dismissing the claims of the petitioners in this matter.

Whether the Court erred in injecting itself into matters that were in the sole province of the jury (i.e. whether the trial court has merely substituted its opinion on disputed questions of fact for that of the jury).

III. WHETHER THE TRANSCRIPT OF ANY EVIDENCE TAKEN BEFORE THE TRIAL COURT OR ANY ADMINISTRATIVE AGENCY IS NECESSARY TO RESOLVE THE ISSUES RAISED ON APPEAL, THE NAME OF THE COURT REPORTER, AND THE APPROXIMATE LENGTH OF ANY TRANSCRIPT OF TESTIMONY ANTICIPATED TO BE FILED IN THIS ACTION

No trial was held in this case and as such, there is no transcript of the trial court necessary for this appeal. There are transcripts of various witnesses that were quoted in the briefs supporting the pleadings related to the dismissal of said lawsuit. Only portions of the transcripts of three depositions were cited in said pleadings. Those portions were added as exhibits to:

- Defendants' Amended Motion for Summary Judgment
- Plaintiffs Objection to Defendants' Amended Motion for Summary Judgment and Motion for Extension of Time to Obtain Affidavit Per Rule 56, and
- Defendants Reply in Support of Motion for Summary Judgment.

IV. AS TO FILING IN THE COURT OF APPEALS ONLY, STATE WHETHER OR NOT A PRE-ARGUMENT CONFERENCE IS REQUESTED

Petitioner does not request a pre-argument conference.

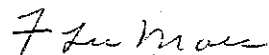
V. THE NAMES OF COUNSEL FOR THE PARTIES, THEIR ADDRESSES, TELEPHONE NUMBERS, AND REGISTRATION NUMBERS

VI. APPENDIX

Order of the Weld County District Court.

Respectfully submitted,

By:



F. Lee Maes, #12860

Attorney for the Plaintiffs

1100 S. Shoshone Street

Denver, CO 80223

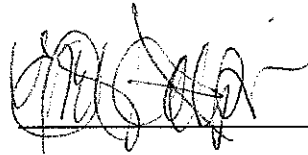
(303) 922-0300

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing NOTICE OF APPEAL by Lexis-Nexis and First Class Mail on January 3, 2008, to the following:

DISTRICT COURT, WELD COUNTY
P.O. Box 2038, Greeley, CO 80632-2038

William A Rogers, III, Esq.
Rachel A. Spicer, Esq.
Wood, Ris, & Hames, P.C.
1775 Sherman Street, Suite 1600
Denver, CO 80203



**APPENDIX TO
PETITIONER-APPELLANTS'
NOTICE OF APPEAL**

Exhibit #1: Order of the Jefferson County District Court.

DISTRICT COURT, WELD COUNTY, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631-1113 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038	FILED Document - District Court 2006CV81 CO Weld County District Court Filing Date: Nov 20 2007 4:35PM MS Filing ID: 1732
Plaintiffs: RAUL FLORES CANO (father) and OLIVIA CONCEPCION BERMUDEZ FLORES (mother), v. Defendants: FIRESTONE LIQUORS, INC. and SYLVIA ABERLY (owner), SCOTT A. ABERLY (director), JOHN/JANE DOE.	<div style="border: 1px solid black; padding: 5px; text-align: center;"> E-FILED DISTRICT COURT NOV 20 2007 WELD COUNTY, COLORADO </div> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 06CV81 Division: 10</p>
ORDER GRANTING DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT	

THIS MATTER comes before the Court on Defendants' Amended Motion for Summary Judgment filed September 11, 2007. The Court having reviewed the motion and all related filings and being fully advised in the premises, HEREBY FINDS as follows:

I

This case arises out of a motor vehicle accident which took place just after 5:00 a.m. on February 9, 2005. Plaintiffs' son and daughter were traveling eastbound on Colorado Highway 52, when Tobias Sholes' vehicle struck their vehicle head-on. Mr. Sholes was driving under the influence of alcohol at the time. Both adult children died as a result of the collision. On February 3, 2006, Plaintiffs filed this action against Firestone Liquors, Inc. and its owners, contending that the liquor store and its owners should be held liable because Mr. Sholes and Michael Dewey, the passenger in Mr. Sholes' vehicle at the time of the accident, had purchased alcohol from the store while intoxicated prior to the accident.

On March 14, 2007, the Court granted Defendants' Partial Motion to Dismiss Plaintiffs' second and fourth claims for relief based on negligence, negligence *per se*, and *respondeat superior*. The Court permitted Plaintiffs' first and third claims for wrongful death, C.R.S. §13-21-202,¹ and liability under the Dram Shop Act, C.R.S. § 12-47-801,² to proceed.

¹ This statute states,

When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such

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II

In their amended motion, Defendants allege that they are entitled to summary judgment because there is no evidence that they sold liquor to Mr. Sholes prior to the accident. *Amended Motion at p.7.*

In their Objection, Plaintiffs contend that summary judgment in favor of Defendants is inappropriate for the following reasons:

- (1) According to Mr. Sholes, six months after the accident, Sylvia Aberly told Mr. Sholes, "Who would have thought that she would have sold us our last 12-pack of beer?" *Objection at pp.2-3.*
- (2) During her own deposition, Mrs. Aberly "admitted . . . that she made the statement to T. Sholes, "...I sold you guys your last 12 pack." *Objection at p.3.*
- (3) Michael Dewey did not purchase the beer at Pit Stop Liquors because it was closed "at about 10:00 p.m. on the evening of February 8, 2005." *Objection at p.4.*
- (4) "T. Sholes and Michael Dewey had the opportunity to purchase alcohol at Firestone Liquors on the evening of February 8, 2005 since they left the house early enough to purchase alcohol from Firestone Liquors." *Objection at p.4.*

case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

C.R.S. § 13-21-202.

² This statute provides that

No licensee is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person, except when:

(I) It is proven that the licensee willfully and knowingly sold or served any alcohol beverage to such person who was under the age of twenty-one years or who was visibly intoxicated; and

(II) The civil action is commenced within one year after such sale or service.

C.R.S. § 12-47-801(3)(a)(I), (II).

(5) Mr. Sholes' wife, Bree Sholes, indicated that she arrived home "as early as 10:24 p.m. . . . to find T. Sholes and Dewey watching a music video," that "she could have exited her bedroom as early as 10:29 P.M." to "tell the boys to lower the volume on the music video and to quiet the commotion. Dewey," and that an argument that resulted lasted around five minutes³ before the two men went into the garage for around ten minutes, and then left in a vehicle. Based on this information, Plaintiffs assert that "[t]he boys left the residence and drove 400 yards to Firestone Liquors arriving about a minute later at 10:50 p.m." *Objection at p.5.*

(6) The "date and time stamp for the cash register printed the time at 22:44 p.m.," as well as handwriting on the cash register receipts, suggests that Mrs. Aberly was "in the store as late as 10:54 p.m." *Objection at p.5.*

(7) Mr. Sholes and Mr. Dewey were both visibly intoxicated in the late hours of February 8, 2005. *Objection at p.7.*

(8) Mr. Sholes was visibly intoxicated at the accident site. *Objection at p.8.*

In their Reply, Defendants reiterate that "there is no competent evidence to support Plaintiffs' contention that Firestone Liquors, Inc. willfully and knowingly sold alcoholic beverages to Tobias Sholes when he was visibly intoxicated." *Reply at p.1.*

III

"Under C.R.C.P. 56(c), summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Summary judgment is "a drastic remedy which denies litigants their right to trial." *Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978). Consequently, all doubts will be resolved in favor of the non-moving party. *Id.*

The moving party has the initial burden to show that there is no genuine issue of material fact. *Id.* "Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact." *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). The non-moving party must point to specific facts. "Stubborn reliance upon allegations or denials in the pleadings will not suffice when faced with an affidavit affirmatively showing the absence of a triable issue of material fact." *Ginter*, 585 P.2d at 585. "If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." *Continental Air Lines, Inc.*, 731 P.2d at 713.

³ Plaintiffs seek the extension of time to obtain an affidavit from investigator Rae Lee Knapp that Mrs. Sholes told Mr. Knapp that "the shortest timeframe for this argument would have been 5 minutes." *Objection at p.5.*

IV

In order to establish that Defendants may be held liable for violation of the Dram Shop Act, Plaintiffs must set forth evidence that Defendants willfully and knowingly served a visibly intoxicated Mr. Sholes on the night of February 8, 2005. C.R.S. § 12-47-801(3)(a). Viewing the evidence in the light most favorable to Plaintiffs, the Court finds as a matter of law, however, that Plaintiffs cannot establish that Mr. Sholes purchased beer from Defendants in the late hours of February 8, 2005. Accordingly, summary must be granted in favor of Defendants as to the two remaining claims.

The record reflects as follows:

- (1) Mr. Sholes cannot remember either going to Firestone Liquors on the night of February 8, 2005, or drinking beer purchased from that liquor store that night. *T. Sholes Depo at 112- 113*. Furthermore, he does not recall anything after he left the house that night, except for shooting rabbits near Fort Morgan. *Id. at 45*.
- (2) Before leaving his home on the night of February 8, 2005, Mr. Sholes drank approximately 12 to 15 beers, which he had purchased on February 7, 2005. *T. Sholes Depo at 112*.
- (3) Mr. Dewey purchased a twelve pack of beer from Firestone Liquors in the late afternoon or early evening hours of February 8, 2005, before he went to Mr. Sholes' house that night. *S. Aberly Affidavit at ¶ 4; Dewey Depo at 7-8*. At the time Mrs. Aberly sold Mr. Dewey the beer, Mr. Dewey was alone, he did not appear to be intoxicated, *S. Aberly Affidavit at ¶ 7*, and had not consumed any liquor that day. *Dewey Depo at 8*.
- (4) Mr. Dewey believes that he and Mr. Sholes probably purchased beer in the late hours of February 8, 2005, from Pit Stop Liquors. *Dewey Depo at 14-15*. He testified that they did not purchase the beer from Firestone Liquors that night. *Id. at 34; see also Dewey Affidavit*.
- (5) Although Mrs. Aberly testified that she did, in fact, tell Mr. Sholes, "I sold you guys your last 12 pack," *S. Aberly Depo at 37:13-14*, her affidavit dated September 6, 2007, clarifies that she was referring to the sale of beer to Mr. Dewey earlier that day, when Mr. Dewey did not appear intoxicated. *S. Aberly Affidavit*.
- (6) Mrs. Sholes testified during her deposition that she did not know where Mr. Sholes and Mr. Dewey went after they left the Sholes' house the night of February 8, 2005. *Mrs. Sholes Depo at 60-61*.

In light of the facts presented, the Court finds as a matter of law that Plaintiffs cannot establish that Mr. Sholes and Mr. Dewey purchased beer from Defendants during the late hours of

February 8, 2005. In short, Plaintiffs' claim that Mr. Dewey purchased beer from Defendants that night is based only on surmise, speculation, and conjecture. *See generally Ramirez v. Mixsooke*, 907 P.2d 617, 619 (Colo. App. 1994) ("The only way that negligence of a nonparty could be found to be present here would be by application of pure speculation, surmise, or conjecture. Liability cannot be founded on such a basis.").

Because of the Court's finding as to the first part of Defendants' Amended Motion for Summary Judgment, the Court need not address the argument regarding piercing the corporate veil. *See Amended Motion at pp.9-10.*

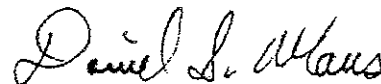
V

THEREFORE IT IS ORDERED that Defendants' Amended Motion for Summary Judgment is HEREBY GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for an Extension of Time to Obtain Affidavit Per Rule 56 and Plaintiffs' Motion to Approve Late Endorsement of Expert Disclosures and Motion to Amend Case Management Order to Permit Late Endorsement of Expert are HEREBY DENIED as moot.

IT IS FURTHER ORDERED that the trial in this case for February 4, 2008, is HEREBY VACATED.

Dated: November 20, 2007



Daniel S. Maus
District Court Judge

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.