

<p>COURT OF APPEALS, STATE OF COLORADO          2 E. 14<sup>th</sup> Avenue          Denver, CO 80202</p>	<p>FILED IN THE          COURT OF APPEALS          STATE OF COLORADO          2008 MAY 12 P 4:20</p>
<p>District Court, County of Weld          The Honorable Daniel S. Maus          District Court Case No. 2006CV81</p>	<p>COURT OF APPEALS          STATE OF COLORADO</p>
<p><b>Petitioner-Appellant</b></p> <p><b>RAUL FLORES CANO (father) and OLIVIA CONCEPCION BERMUDEZ FLORES (mother),</b></p> <p>v.</p> <p><b>Respondent-Appellee,</b>  <b>FIRESTONE LIQUORS, INC. and SYLVIA ABERLY (owner), SCOTT A. ABERLY (director),</b></p>	<p>^ COURT USE ONLY ^          Court of Appeals          Case No. 2008CA000019</p>
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<p><b>OPENING BRIEF OF PLAINTIFFS'/APPELLANTS'</b></p>	

Submitted this 12<sup>th</sup> day of May, 2008.

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## **INTRODUCTION**

This case concerns the deaths of 20-year-old Zuri S. Flores and her brother, 24-year-old Isai Flores-Bermudez, who died instantly in a head-on collision in Weld County, Colorado. The other vehicle was being driven by Tobias Sholes, whose blood-alcohol content was more than twice the legal limit. He, along with his friend Michael Dewey, had been drinking beer continuously since the previous afternoon and, at approximately 10:30 p.m., that evening, purchased their final 12-pack. Plaintiffs, the parents and heirs of the decedents, maintain that Sholes and Dewey were visibly intoxicated when they purchased the final 12-pack of beer, and that the beer was sold to them by Defendant Sylvia Aberly, the owner of Defendant Firestone Liquors, Inc. This contention is based, in part, upon a subsequent discussion of the accident between Aberly and Sholes, in which Aberly admitted that: "I sold you guys your last 12-pack." Based upon this and other evidence, the trial court erred in granting summary judgment in favor of Defendants.

## **ISSUES PRESENTED**

In light of Defendant Sylvia Aberly's admission that she sold Sholes and Dewey their last 12-pack, as well as other evidence corroborating this admission, whether the trial court erred in granting summary judgment in favor of Defendants.

## **STATEMENT OF THE CASE**

On February 3, 2006, Plaintiffs filed their initial complaint in this case, which was subsequently amended on March 10, 2006 (Initial and Amended Complaints, filed on 2/3/06 and 3/10/06 respectively). The amended complaint asserted violations of Colorado's dram shop and wrongful death statutes (Amended Complaint, filed 3/10/06).<sup>1</sup> Discovery was conducted and, on September 11, 2007, Defendants moved for summary judgment ("Defendants' Motion") (Defendants' Amended Motion for Summary Judgment, filed on 9/11/07). Plaintiffs filed a timely opposition to the motion for summary judgment ("Plaintiffs' Objection") (Plaintiffs' Objection to Defendants' Amended Motion for Summary Judgment, filed on 9/26/07). Defendants then filed a reply pleading ("Defendants' Reply") (Defendants' Reply in Support of Motion for Summary Judgment, filed on 10/3/07). On November 20, 2007, the trial court granted summary judgment in favor of Defendants (Order Granting Defendants' Amended Motion for Summary Judgment, filed on 11/20/07). This timely appeal followed.

## **STATEMENT OF THE FACTS**<sup>2</sup>

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<sup>1</sup> Claims for negligence and negligence per se were also asserted, but were subsequently dismissed by the trial court.

<sup>2</sup> The facts of this case are set forth in the light most favorable to the non-moving party. *See Continental Divide Ins. Co. v. Dickinson*, 179 P.3d 202, 204 (Colo. App. 2007) (on appeal of a summary judgment ruling, this Court views the facts in the light most favorable to the non-moving party).

On Tuesday, February 8, 2005, 30-year-old Tobias Sholes (“Sholes”), a house framer, worked until approximately 1:00 p.m. (Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p24). He arrived back at his Firestone, Colorado home, which he shared with his wife Bree, at approximately 1:30 p.m. (Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p24). In the refrigerator, Sholes had approximately 18 beers, which he began to consume at approximately 3:00 p.m. (Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p25). Over the course of the evening, Sholes consumed between 12 and 15 beers from his refrigerator (Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p112).

Sholes’ best friend Michael Dewey arrived at Sholes’ home at approximately 3:30 p.m. (Plaintiffs’ Objection, Exhibit 6, Affidavit of Michael Dewey). Sholes and Dewey had known each other since high school (Defendants’ Motion, Exhibit B, Deposition of Tobias Sholes, p8, Exhibit F, Deposition of Michael Dewey, p33-34; Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p113-14). During the 16 years that they had known each other, they had gone drinking together on numerous occasions (Defendants’ Motion, Exhibit B, Deposition of Tobias Sholes, p8).

At approximately 4:30 p.m., Dewey drove to Firestone Liquors, a liquor store located approximately 400 yards from the Sholes home (Plaintiffs' Objection, p5). There, Dewey purchased a 12-pack of Budweiser beer, in bottles (Defendants' Motion, Exhibit C, Affidavit of Sylvia Aberly; Plaintiffs' Objection, Exhibit 6, Deposition of Michael Dewey). Sholes and Dewey cooked dinner, and continued to socialize, until approximately 10:30 p.m., at which time they left the Sholes home together, in Dewey's truck (Plaintiffs' Objection, Exhibit 6, Deposition of Michael Dewey).<sup>3</sup> At that time, both Sholes and Dewey were visibly intoxicated (Defendants' Motion, Exhibit E, Deposition of Bree Sholes, p70; Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p36-37, 44).

Sholes and Dewey decided to go rabbit hunting, and then to drive to Dewey's parents' farmhouse in Masters, Colorado (Defendants' Motion, Exhibit B, Deposition of Tobias Sholes, p86; Exhibit F, Deposition of Michael Dewey, p32). Normally, before they drove to the farmhouse,

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<sup>3</sup> Bree Sholes' deposition suggests that her husband left the home closer to 10:50 p.m. (Plaintiffs' Objection, p4-5). However, Bree Sholes has acknowledged that she "doesn't know about the shortest times" (Plaintiffs' Objection, Exhibit 7, Deposition of Bree Sholes, p79). Furthermore, even if Sholes and Dewey left at 10:50 p.m., the evidence shows that they could still have purchased beer from Sylvia Aberly, at Firestone Liquors, before she closed the store (Plaintiffs' Objection, p4-7). Finally, the conflict between Dewey's estimate of a 10:30 p.m. departure time, and Bree Sholes' estimate of a later departure time, is one that must be resolved in favor of Plaintiffs at this stage in the proceedings.

Sholes and Dewey would make sure that they had beer available for the drive (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p46-47; Exhibit 3, Summary of Sholes statement). If they were out of beer, they would stop at Firestone Liquors to purchase beer (id.). Although a Safeway and a gas station in Firestone also sold beer, the alcohol content of that beer was only 3.2 percent alcohol, and Sholes and Dewey preferred stronger beer (Plaintiffs' Objection, Exhibit 3, Summary of Sholes statement).

After leaving Sholes' house, Sholes and Dewey did, in fact, purchase a 12-pack of beer (Defendant's Motion, Exhibit F, Deposition of Michael Dewey, p10-11). Both men went into the store, at which time Dewey handed money to Sholes, and Sholes bought the beer (Defendant's Motion, Exhibit F, Deposition of Michael Dewey, p59). It is Dewey's recollection that the beer was purchased near the intersection of I-76 and Highway 52 (Plaintiff's Objection, Exhibit 6, Affidavit of Michael Dewey). Dewey has identified the Pit Stop Liquor store as the establishment where Sholes purchased the beer (Defendants' Motion, Exhibit F, Deposition of Michael Dewey, p14-15). However, this assertion was factually impossible, and therefore untrue, because Pit Stop Liquors always closes 10:00 p.m., and did so on the night of February 8, 2005 (Plaintiff's Objection, Exhibits 4, 5. Affidavits and Business Records relating to Pit Stop Liquors).



Sylvia Aberly, the owner of Firestone Liquors, was working in the store on the night of February 8, 2005. She closed out her register at 10:44 p.m.,<sup>4</sup> and was present in the store until at least 10:56 p.m. that night (Plaintiffs' Objection, p6; Exhibit 2, Deposition of Sylvia Aberly, p27-28; Exhibit 9, Cash Register Receipts). Therefore, Sholes and Dewey had plenty of time to buy beer at her store, if they drove the 400-yard distance at approximately 10:30 p.m.

Aberly acknowledges that, approximately six months after the accident in this case, which garnered significant television and newspaper publicity (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p57), Sholes came into the store while he was out on bond (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p35). At that time, the two of them engaged in a conversation regarding the circumstances and repercussions surrounding the fatal car accident (*id.*). Aberly "let him know that what happened had terribly upset" her (*id.*). She went on to state that she "sold you guys your last 12 pack" (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p37, 39). Although Defendants have sought to

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<sup>4</sup> Sholes and Dewey could have purchased the beer after Aberly closed out her register, because Aberly sometimes sells merchandise between the time that she closes out her register, and the time that she leaves the store (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p27).

interpret this statement in an innocuous manner,<sup>5</sup> the clear implication, as recognized by Sholes, who left the store crying, was that Aberly “was the one that sold us our last 12-pack that evening” (Plaintiffs’ Objection, Exhibit 1, Deposition of Tobias Sholes, p59, 131-32). It follows that Michael Dewey entered Firestone Liquors twice on February 3, 2006:

First, at 4:40 p.m., Michael Dewey entered Firestone Liquors by himself to purchase a 12 pack.

Second, at or about 10:30 p.m., Michael Dewey entered Firestone Liquors with Tobias Sholes whereupon Aberly sold both “guys” their last 12 pack.

Any conflict with this conclusion must be resolved in favor of the Plaintiffs at this stage in the proceedings.

After purchasing the final 12-pack, Sholes and Dewey drove to a remote location to shoot rabbits (Defendants’ Motion, Exhibit B, Deposition of Tobias Sholes, p86, 110; Exhibit F, Deposition of Michael Dewey, p32). Dewey was driving his truck at that time (Defendants’ Motion, Exhibit B, Deposition of Tobias Sholes, p110). On the way, they consumed the contents of the 12-pack (Defendants’ Motion, Exhibit B, Deposition of

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<sup>5</sup> At her deposition, Aberly testified that this statement meant that she wasn’t going to be selling Sholes any more beer, because he was “going away for a long time.” (Defendants’ Reply, Exhibit I, Deposition of Sylvia Aberly, p42-43). However, this interpretation makes no sense, because Aberly utilized the plural term “guys,” indicating that she was also talking about Dewey. Dewey was not charged with any crime in relation to the fatal accident, and was free to purchase as much beer as he pleased.

Tobias Sholes, p48-49, 86; Exhibit F, Deposition of Michael Dewey, p30). After shooting rabbits, Sholes and Dewey drove to the farmhouse owned Dewey's parents, located in Masters, Colorado (Plaintiffs' Objection, Exhibit 6, Affidavit of Michael Dewey). They arrived at the farmhouse at approximately 2:30 a.m., in the early morning hours of February 9, 2005. There, they drank more beer, and watched television (Plaintiffs' Objection, Exhibit 11, Deposition of Michael Dewey, p30).

A few hours later, they left Dewey's parents' farmhouse, and headed back toward Sholes' home in Firestone. Sholes was driving Dewey's truck during the return trip (Plaintiffs' Objection, Exhibit 6, Affidavit of Michael Dewey). By that time, Sholes and Dewey had each consumed as much as 24 beers (also known as a "case" of beer), or more (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p118).

At approximately 5:05 a.m., the truck being driven by Sholes collided head-on with a Saturn Ion being driven by Zuri Flores (Defendants' Motion, Exhibit A, Police Report). Zuri Flores and her brother Isai Flores-Bermudez were killed in the accident (id.). Following the accident, Sholes' blood-alcohol content was .17, more than two times the legal limit (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p122). Sholes subsequently pled guilty to two counts of vehicular homicide, and received a 36-year prison sentence (Plaintiffs' Objection, Exhibit 1, Deposition of

Tobias Sholes, p122). Dewey suffered a concussion and head injury in the accident, causing him to forget some of the events and circumstances surrounding the night in question (Defendants' motion, Exhibit F, Deposition of Michael Dewey, p53).

### **SUMMARY OF THE ARGUMENT**

In light of Defendant Sylvia Aberly's admission that she sold Sholes and Dewey their last 12-pack, as well as circumstantial evidence corroborating this admission, the trial court erred in granting summary judgment in favor of Defendants.

### **STANDARD OF REVIEW**

Summary judgment is a drastic remedy appropriate only when the pleadings and supporting documents show that no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. *In re Tonko*, 154 P.3d 397, 402 (Colo. 2007). On appeal, this Court reviews a summary judgment de novo, considering the facts in the light most favorable to the non-moving party. *Continental Divide Ins. Co. v. Dickinson*, 179 P.3d 202, 204 (Colo. App. 2007).

## ARGUMENT

### **I. SYLVIA'S ADMISSION OF LIABILITY, COUPLED WITH CIRCUMSTANTIAL EVIDENCE CORROBORATING THIS ADMISSION, PRESENTED A GENUINE ISSUE OF MATERIAL FACT**

In its order granting summary judgment, the trial court credited the testimony of Michael Dewey that the final 12-pack of beer was purchased at Pit Stop Liquors rather than Firestone Liquors (Trial Court Order, filed on 11/20/07, p5). In addition, the trial court found that Aberly's statement that she "sold you guys your last 12 pack," did not refer to the 12-pack purchased by Sholes and Dewey at approximately 10:30 p.m. of February 3, 2005 (id.). Rather, the Court found that Aberly's "affidavit dated September 6, 2007, clarifies that she was referring to the sale of beer to Mr. Dewey earlier that day" (id.). For the reasons provided below, the trial court's judgment should be reversed.

Under Colorado's dram shop statute, C.R.S. §12-47-801(3), a licensed vendor of alcoholic beverages who willfully and knowingly sells an alcoholic beverage to a visibly intoxicated person is "civilly liable to any injured individual or his estate for any injury to such individual" that is caused by the visibly intoxicated person, and that is due to the sale of alcohol to that person. Whether a licensee willfully and knowingly sold or served alcohol to a visibly intoxicated person is a question of fact which may

be proved by direct or circumstantial evidence. *Christoph v. Colorado Communications Corp.*, 946 P.2d 519, 523 (Colo. App. 1997).

As relevant in the instant case, direct evidence may include an admission by the defendant as to one or more elements of the claim. *See Deeds v. People*, 747 P.2s 1266, 1272 (Colo. 1987) (“A confession is ‘powerful and persuasive’ evidence of the declarant’s guilt”).

Circumstantial evidence may include evidence of habit or routine, which is relevant to show that a person acted in conformity with the habit or routine. CRE 406; *Bloskas v. Murray*, 646 P.2d 907, 911 (Colo. 1982). In addition, circumstantial evidence may include evidence established through the process of elimination, as the process of elimination is considered a reliable scientific method. *Farmland Mutual Ins. Companies v. Chief Industries, Inc.*, 170 P.3d 832, 836 (Colo. App. 2007).

Here, Plaintiffs presented direct evidence of Defendants’ liability, in the form of Sylvia Aberly’s admission that she sold Sholes and Dewey their last 12-pack prior to the fatal accident. In addition, Plaintiffs presented circumstantial evidence that Sholes and Dewey purchased a 12-pack at Firestone Liquors. This evidence included the following: (1) the departure from Sholes’ nearby home at approximately 10:30 p.m., coupled with Aberly’s presence in the store until approximately 10:56 p.m.; (2) the purchase by Sholes and Dewey of a 12-pack, a quantity identical to that

referenced by Aberly in her subsequent statement to Sholes; (3) the habit and routine of Sholes and Dewey of buying beer at Firestone Liquors before driving to the farmhouse owned by Dewey's parents; (4) the impossibility of Pit Stop Liquors, or any other store, serving as the source of the final 12-pack purchased by Sholes and Dewey. The totality of this evidence was sufficient to withstand Defendants' motion for summary judgment. *Cf. Christoph v. Colorado Communications Corp., supra*, 946 P.2d 519 (Colo. 1997) (in case involving dram shop claim alleging that defendants willfully and knowingly sold alcohol to a visibly intoxicated person, direct and circumstantial evidence was sufficient to present genuine issues of material fact, and therefore trial court erred in granting summary judgment in favor of defendant-vendors).

In its order granting summary judgment, the trial court made certain credibility determinations that, under the state of the evidence presented, it was not entitled to make. First, the trial court gave no credence whatsoever to Aberly's admission to Sholes that she "sold you guys your last 12 pack," finding instead that the subsequent "clarification" of that statement, contained in Aberly's affidavit, more accurately reflected her conduct on the night in question. However, the trial court misconstrued Aberly's affidavit, which never references the statement to Sholes, and provides no explanation for that statement. *See Defendants' Motion, Exhibit C; Affidavit of Sylvia*

Aberly. Aberly did provide an explanation at her deposition, where she testified that the statement meant that she wasn't going to be selling Sholes any more beer, because he was "going away for a long time." See Defendants' Reply, Exhibit I, Deposition of Sylvia Aberly, p42-43. However, this interpretation makes no sense, because Aberly utilized the plural term "guys," indicating that she was also talking about Dewey, who was not charged with any crime in relation to the fatal accident, and was free to purchase as much beer as he pleased. Moreover, it is axiomatic that Aberly, a named defendant in the case, had a motive to deny that her statement to Sholes constituted an admission of liability.

Second, the trial court credited Dewey's testimony that the final 12-pack of beer was purchased at Pit Stop Liquors rather than Firestone Liquors. Regarding the purported purchase at Pit Stop Liquors, the evidence definitively showed that the Sholes and Dewey remained at the Sholes home until at least 10:30 p.m. on the night of February 8, 2005, and that Pit Stop Liquors closed at 10:00 p.m. that night, as it always does. Therefore, Dewey's assertion that the final 12-pack was purchased at Pit Stop Liquors was factually impossible. Regarding Dewey's denial that the final 12-pack was purchased at Firestone Liquors, the evidence showed that Dewey consumed a case of beer, or more, on the night in question, which undoubtedly affected his perception and memory. Moreover, in the accident



Dewey suffered a concussion and head injury which, by his own admission, caused him to forget some of the events and circumstances surrounding that evening.

“The trial court’s initial function in ruling on a motion for summary judgment is to determine whether any material facts are disputed – not to resolve those disputes or to assess the credibility of the parties or witnesses supplying the evidentiary matter.” *Crouse v. City of Colorado Springs*, 766 P.2d 655, 661 (Colo. 1988); accord, *Capitran, Inc. v. Great Western Bank*, 872 P.2d 1370, 1376 (Colo. App. 1994). Here, the credibility of both Sylvia Aberly and Michael Dewey was subject to challenge, and the trial court was not authorized, at this stage in the proceedings, to find that these witnesses were credible.

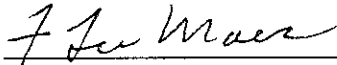
As shown above, Plaintiffs presented sufficient evidence of a violation of the dram shop statute to present a genuine issue of material fact, and to withstand a motion for summary judgment. And, contrary to the finding of the trial court, the testimony provided by the defense did not serve to “clarify,” or negate, the evidence presented by Plaintiffs. Therefore, the trial court granted summary judgment in error, and the judgment should be reversed.

**CONCLUSION**

Wherefore, for the foregoing reasons, Plaintiffs asks this Court to reverse the judgment in favor of Defendants, and to remand this matter for trial.

Dated this 12th day of May, 2008.

Respectfully submitted,



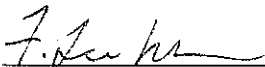
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing **APPELLANTS' OPENING BRIEF** by First Class Mail on May 12, 2008, to the following:

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