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COURT OF APPEALS STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203	
Appeal from Weld County District Court The Honorable Daniel S. Maus Case No. 06CV81	▲COURT USE ONLY▲
Plaintiff-Appellant: RAUL FLORES CANO (father) and OLIVIA CONCEPCION BERMUDEZ FLORES (mother), v. **Defendants-Appellees:** FIRESTONE LIQUORS, INC. and SYLVIA ABERLY (owner), SCOTT A. ABERLY (director).	Case No.: 2008CA000019 Division:
Attorneys for Defendants-Appellees: William A. Rogers, III #21630 Rachel A. Spicer, #36710 Wood, Ris, & Hames, P.C. 1775 Sherman Street, Suite 1600 Denver, Colorado 80203-4313 Phone: (303) 863-7700 Fax: (303) 830-8772 Email: wrogers@wrhlaw.com; rspicer@wrhlaw.com	
ANSWER BRIEF	

The Defendants-Appellees, Firestone Liquors, Inc., Sylvia Aberly, and Scott A. Aberly, through their attorneys, Wood, Ris & Hames, P.C., hereby submit their Answer Brief and state as follows:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. **Whether the trial court properly granted summary judgment in favor of Firestone Liquors, Inc. given the absence of any facts supporting the Plaintiffs' claims for relief.**

2. **Whether the individual shareholders of Firestone Liquors, Inc., Sylvia and Scott Aberly, were in any event entitled to summary judgment.**

STATEMENT OF THE CASE

This case arises out of a tragic motor vehicle accident which took place just after 5:00 a.m. on February 9, 2005. The Plaintiffs' son and daughter were travelling eastbound on Colorado Highway 52 when they were struck head-on by drunk driver Tobias Sholes. Both adult children died as a result of the collision. The Plaintiffs brought suit exclusively against Firestone Liquors, Inc. and its owners, contending that Mr. Sholes purchased alcohol at the Defendants' liquor store on February 8, 2005. In order to establish their claims, Plaintiffs were obligated, pursuant to Colorado's Dram Shop Act, C.R.S. § 12-47-801, to come forward with competent evidence to demonstrate that as a licensed vendor of alcoholic beverages, Firestone Liquors knowingly and willfully sold alcohol to Mr. Sholes at a time when he was visibly intoxicated. After reviewing the uncontroverted evidence from the only three witnesses with personal knowledge as

to whether Firestone Liquors sold any alcohol to Mr. Sholes on February 8, 2005, the District Court granted summary judgment in favor of the Defendants on November 20, 2007. Rather than relying on competent evidence to show that the trial court improperly ruled against them, the Plaintiffs instead present exclusively surmise, speculation, and conjecture through the unsupported arguments of their counsel to assert that the District Court's summary judgment ruling was in error.

STATEMENT OF FACTS

At 5:05 a.m. on February 9, 2005, Isai Flores Bermudez and his sister, Zuri Flores, were travelling eastbound on Highway 52 in a 1993 Saturn Ion when they were involved in a head-on motor vehicle accident with a 1994 Dodge 1500 Ram pickup truck owned by Michael Dewey. See Colorado State Patrol Police Report ("Police Report") attached as Exhibit A to the Defendants' September 11, 2007 Amended Motion for Summary Judgment (hereinafter "Defendants' Motion"). At the time of this accident, Mr. Dewey's pickup truck was being driven by Tobias Sholes. See August 16, 2007, deposition of Tobias Sholes at 6:22-7:4, attached as Exhibit B to Defendants' Motion (hereinafter "Sholes deposition"). The Plaintiffs' son and daughter were instantly killed in the automobile accident. See Plaintiffs' February 3, 2006 Complaint and Jury Demand at ¶ 13; See also Police Report.

Mr. Sholes was charged with, among other offenses, two counts of vehicular homicide DUI arising out of the February 9, 2005, accident. He ultimately pleaded guilty to those charges in November 2005, and in February 2006, was sentenced to 36 years in prison. See Sholes deposition at 122:11-25. At the time of the accident, Mr. Sholes had already pleaded guilty to three earlier alcohol-related offenses and his driver's license had been revoked since approximately 1997. Id. at 16:14-22; 75:23-78:23.

Prior to February 2005, Mr. Sholes and his best friend, Michael Dewey, had been frequent and regular drinking companions since high school. See Sholes deposition at 8:8-9:13. Mr. Sholes' general habit and practice in February 2005 was to come home from work and drink a 12-pack of beer every single night. Id. at 11:4-10; 16:8-13. On a weekend, Mr. Sholes might increase his consumption of alcohol up to a case of beer. Both Mr. Dewey and Mr. Sholes could readily consume a case of beer each on any given evening. Id. at 11:15-23; 74:23-75:1. Mr. Sholes believes that as of February 2005, both he and Mr. Dewey were most certainly alcoholics. Id. at 75:15-22.

On Tuesday morning, February 8, 2005, Mr. Sholes went to work as a carpenter, doing residential home framing. See Sholes Deposition at 24:6-18. Mr. Sholes worked that day until approximately 1:00 p.m., when he headed home

arriving sometime between 1:00 p.m. and 2:00 p.m. Id. at 24:12-13; 108:2-6. Mr. Sholes did not stop on his way home from work and purchase any beer or alcohol. Id. at 108:7-10. He didn't need to stop because he had previously purchased a 20-pack of beer on February 7, 2005, and consumed only two of these 20 beers the evening before. See Sholes Deposition at 25:12-17; 111:13-112:7. The beer purchased by Mr. Sholes on February 7, 2005 was Budweiser in cans. Id. Mr. Sholes began drinking beer at his residence in Frederick, Colorado at approximately 3:00 p.m. on February 8, 2005. See Sholes Deposition at 108:18-20.

Mr. Dewey arrived at Mr. Sholes' home in Frederick, Colorado, sometime between 3:30 p.m. and 4:00 p.m. on February 8, 2005. See Sholes Deposition at 108:11-13; See also, July 19, 2007 deposition of Michael Dewey at 7:6-10, attached as Exhibit F to Defendants' Motion (hereinafter "Dewey deposition"). At approximately 4:30 or 4:45 p.m., Mr. Dewey drove to Firestone Liquors and purchased a 12-pack of Budweiser beer in bottles. See Dewey deposition at 7:23-8:2; See also, September 6, 2007 Affidavit of Sylvia Aberly at ¶ 4, attached to Defendants' Motion as Exhibit C (hereinafter "Aberly Affidavit").

Ms. Aberly is the majority shareholder of Firestone Liquors, Inc. and has been since she purchased the liquor store in October 2004. See Aberly Affidavit at

¶ 2. Ms. Aberly was the only individual who worked in Firestone Liquors the entire day of February 8, 2005. See Aberly Affidavit at ¶ 3. Scott Aberly, Sylvia Aberly's husband and another shareholder of Firestone Liquors, was not present in Firestone Liquors at any time on February 8, 2005. Id. at ¶ 6.

When Mr. Dewey came into Firestone Liquors on the afternoon of February 8, 2005, he entered the liquor store alone and made his purchase with cash. See Aberly Affidavit at ¶ 4. Sylvia Aberly was the only other person present in the store. Id. at ¶ 5. When Mr. Dewey made his purchase of a 12-pack of beer on the afternoon of February 8, 2005, he did not appear to Ms. Aberly to be intoxicated. She did not smell any alcohol on Mr. Dewey's breath or observe any slurred speech, bloodshot eyes, difficulty walking or any other visible sign of intoxication. See Aberly Affidavit at ¶ 7. Mr. Dewey agreed with this assessment. Prior to the time that he arrived at Firestone Liquors on the afternoon of February 8, 2005, he had not consumed any alcohol the entire day. See Dewey deposition at 8:13-17; 46:18-22. Mr. Dewey returned to the Sholes residence at approximately 5:00 p.m. on February 8, 2005. See Dewey deposition at 9:3-8.

Sylvia Aberly knew Tobias Sholes because he was a fairly regular customer at Firestone Liquors. When Mr. Dewey purchased the 12-pack of beer at Firestone Liquors on the afternoon of February 8, 2005, Tobias Sholes did not accompany

him into the liquor store. See Aberly Affidavit at ¶ 9. Mr. Dewey did not return to Firestone Liquors at any time later on February 8, 2005, nor was he in the liquor store at any time prior to his purchase on the afternoon of February 8, 2005. Id. at ¶ 8; See Dewey deposition at 46:23-47:3. Tobias Sholes never came into Firestone Liquors at any time on February 8, 2005. See Aberly Affidavit at ¶ 9. Firestone Liquors, Inc. sold no beer or alcohol to Tobias Sholes on the evening of February 8, 2005 or the early morning hours of February 9, 2005. Id. at ¶ 12.

Firestone Liquors made its last sale on the evening of February 8, 2005 at approximately 10:33 p.m. Ms. Aberly closed out the cash register at 10:44 p.m. and departed the store that evening at 10:45 p.m. See Aberly Affidavit at ¶ 10. Firestone Liquors did not reopen until 10:00 a.m. the following morning, February 9, 2005. Id. at ¶ 11.

In February 2005, Mr. Sholes lived in his home in Frederick, Colorado, with his wife, Bree Sholes. See July 19, 2007 Deposition of Bree Sholes at 7:10-8:5, attached as Exhibit E to Defendants' Motion (hereinafter "Bree Sholes Deposition"). That evening, Mrs. Sholes was at work at a Checker Auto Parts store located at 120th Avenue and Washington in Northglenn, Colorado where she was the closing manager. She worked that day from noon until 10:00 p.m. As the closing manager, she was the last person out of the store. See Bree Sholes

Deposition at 27:12-28:4. Mrs. Sholes departed the Checker Auto Parts store on February 8, 2005, sometime between 10:00 p.m. and 10:15 p.m. Id. at 28:15-19. Bree Sholes' commute from the Checker Auto Parts store to her home in Frederick, Colorado generally took 20 to 25 minutes. Mrs. Sholes estimated that she arrived home sometime between 10:35 and 10:40 p.m. on the evening of February 8, 2005. See Bree Sholes Deposition at 29:6-10.

When Bree Sholes arrived home, Michael Dewey was drinking bottles of beer and Tobias Sholes was drinking cans. Bree Sholes has no idea where any of the beer in the house that evening may have come from. See Bree Sholes Deposition at 53:1-18. Mr. Dewey and Mr. Sholes were listening to loud music which Mrs. Sholes did not particularly appreciate. As a consequence, she went into her bedroom, changed clothes and lay down on the bed. See Bree Sholes Deposition at 38:4-9; 40:8-41:6. Bree Sholes lay down on her bed for approximately 10 - 15 minutes. Id. at 41:15-21. Eventually becoming weary of the noise, Bree Sholes came out into the living room and asked the two boys to turn down the music. Mrs. Sholes recalls that Mr. Dewey became upset and argumentative with her, leading Mr. Sholes to intervene and separate them. As a consequence, Mr. Dewey went out into the garage followed by Mr. Sholes. See

Bree Sholes Deposition at 44:23-46:4. Bree Sholes estimates that the two boys were out in the garage for as long as 30 minutes. Id.

Mr. Dewey testified that he and Tobias Sholes left the Sholes residence sometime between 10:30 p.m. and 11:00 p.m. on February 8, 2005, though he believes it was closer to 11:00 p.m. See Dewey deposition at 10:8-17. Bree Sholes testified that the two boys left her home no earlier than 11:00 p.m. on February 8, 2005. See Bree Sholes deposition at 60:10-14. In fact, Bree Sholes believes that their departure time was close to midnight. Mrs. Sholes is relatively certain of this because shortly after they left, she noticed the clock in the kitchen reading midnight. Id. at 99:17-25. Tobias Sholes can shed no light on the boys' departure time as he is amnesic to most of the evening of February 8, 2005 and much of the morning of February 9, 2005. See Sholes Deposition at 41:11-25; 78:24-79:7; 80:25-81:4; 86:9-16; 109:11-14.

After Mr. Dewey and Mr. Sholes departed the Sholes residence sometime between 11:00 p.m. and midnight on February 8, 2005, they traveled west on Highway 52, where they purchased some gasoline as well as a 12-pack of Budweiser beer at a liquor store in Hudson, Colorado. See Dewey Deposition at 10:8-11:4; see also March 26, 2007 Affidavit of Michael Dewey at ¶ 11, attached to Plaintiffs' September 26, 2007 Objection as Exhibit 6. Mr. Dewey recalls that

the liquor store across the street from the gas station was possibly Pit Stop Liquors, but in any event recalls that the two boys purchased beer in Hudson, Colorado. See Dewey Deposition at 14:19-15:2. Mr. Dewey is certain that after the boys left the Sholes' residence on the evening of February 8, 2005, they did not go to Firestone Liquors and purchase another 12-pack of beer or any other alcohol. Id. at 34:20-24. Whatever the name of the actual liquor store, there is no doubt in Mr. Dewey's mind that the second and only other beer that he (or Mr. Sholes) purchased on the evening of February 8, 2005, or the early morning hours of February 9, 2005, was in Hudson, Colorado. Id. at 58:24-59:6.

Mr. Dewey and Mr. Sholes headed out to Mr. Dewey's parents' home near Masters, Colorado. They had a number of rifles and shotguns with them, which they fired several times, arriving at Mr. Dewey's parents' home at approximately 2:30 a.m. on February 9, 2005. Once there, the boys had a couple of more beers, relaxed and watched some television. See Dewey Deposition at 30:4-13; 32:12-21. It is at approximately this point in time that Mr. Sholes' memory began to return. He recalls being out in the middle of a field in the middle of nowhere in the early morning hours of February 9, 2005. He recalls putting down a beer and shooting at a rabbit with a shotgun. He does not know precisely when this took place. See Sholes deposition at 86:9-87:2. Mr. Sholes recalls seeing some lights off in the

distance, prompting him and Mr. Dewey to flee to Mr. Dewey's parents' home near Masters, Colorado. Id. at 110:1-111:6. Mr. Sholes does not recall when the boys arrived at the home. Id. at 111:7-9.

Mr. Dewey and Mr. Sholes were thus at Mr. Dewey's parents' home early in the morning of February 9, 2005, and each had consumed perhaps a case or more of beer. See Sholes Deposition at 117:25-118:12. Mr. Dewey was tired and didn't want to go anywhere. He wanted to spend the night in his parents' home. See Sholes deposition at 118:13-21. Mr. Dewey began to make accommodations to spend the night there; however, Mr. Sholes decided that he wanted to return home to his wife. See Dewey deposition at 32:22-33:7; 52:21-53:3. Mr. Sholes wanted to depart and head for his home as he suspected his wife would be irritated at him otherwise. See Sholes deposition at 118:25-119:19. Mr. Sholes offered to drive and persisted with Mr. Dewey, until Mr. Dewey finally relented and gave him the keys to his pickup truck. Id. at 119:23-120:1.

Both boys got into Mr. Dewey's pickup truck and Mr. Sholes began driving home toward Frederick, Colorado. Mr. Sholes was drifting off and drunk and having a difficult time driving the vehicle. Mr. Dewey was asleep. Mr. Sholes stopped several times to try and clear his head and wake himself up. Ultimately, he headed westbound on Highway 52 and placed the car on cruise control at 65

mph. See Sholes Deposition at 51:10-52:11; 121:12-21. Mr. Sholes passed out and was awakened by the impact with the Plaintiffs' decedants' vehicle. Id. at 121:22-24.

With respect to the evening of February 8, 2005, Mr. Sholes has absolutely no memory whatsoever of:

- ❖ Going to Firestone Liquors to purchase beer before he and Mr. Dewey left his home for the evening. See Sholes deposition at 82:20-24.
- ❖ When Mr. Sholes and Mr. Dewey left the Sholes residence for the evening. Id. at 80:25-81:4.
- ❖ Mr. Dewey or Mr. Sholes buying beer anywhere after they left his home. Id. at 82:15-19.
- ❖ Mr. Dewey or Mr. Sholes going to Firestone Liquors at any time on the evening of February 8, or early morning hours of February 9, 2005 (Mr. Sholes believes that if he had gone to Firestone Liquors, he would have remembered doing so). Id. at 83:13-84:23.
- ❖ Any stops that Mr. Sholes and Mr. Dewey made after they left his house or what route they might have taken. Id. at 85:12-23.

All of the beer or alcohol that Tobias Sholes drank on the evening of February 8, 2005 before he departed his home that night came from the 20-pack of Budweiser cans he purchased on February 7, 2005. See Sholes Deposition at 112:16-20. Mr. Sholes drank somewhere between 12 and 15 of these 20 cans of beer before he left his home that evening. Id. at 112:21-25. Mr. Sholes has absolutely no knowledge as to the source of any other alcohol that he may have

consumed that evening before or after he left his home. Id. at 113:1-8. Mr. Sholes specifically has no memory of consuming any alcohol on February 8, 2005 or February 9, 2005 purchased at Firestone Liquors. Id. at 113:9-14.

Three people conceivably have personal knowledge as to whether Tobias Sholes purchased alcohol at Firestone Liquors on the evening of February 8, 2005: Tobias Sholes, Michael Dewey and Sylvia Aberly. Sylvia Aberly testified in no uncertain terms that he did not. Mr. Dewey testified in no uncertain terms that he did not. Mr. Sholes testified that he had no memory of purchasing alcohol at Firestone Liquors at any time on February 8, 2005 or the early morning hours of February 9, 2005, though he believes that if he had, it is something he would have recalled. It is against the above facts, supported by competent evidence, that the Plaintiffs unleash their Opening Brief, comprised solely of the arguments of their attorney presenting exclusively surmise, speculation and conjecture.

SUMMARY OF ARGUMENT

The trial court properly determined that the Plaintiffs failed to present any competent evidence that Mr. Sholes purchased any alcohol from Firestone Liquors on February 8, 2005. Because Firestone Liquors closed over six hours prior to the fatal motor vehicle accident, no sale of alcohol by Firestone Liquors could have been causally related to the accident. Finally and alternatively, Plaintiffs' claims

against Scott and Sylvia Aberly must fail because there is no basis upon which to impose personal liability on the corporation's shareholders.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF FIRESTONE LIQUORS BECAUSE IT SOLD NO ALCOHOL TO TOBIAS SHOLES ON FEBRUARY 8, 2005.

The trial court granted summary judgment in favor of Firestone Liquors in connection with Plaintiffs' first claim for relief based on the wrongful death statute, C.R.S. § 13-21-202, as well as their third claim for relief premised on Colorado's Dram Shop Act, C.R.S. § 12-47-801.[1] Liability under the Dram Shop Act exists only if Plaintiffs can prove that Firestone Liquors "willfully and knowingly sold or served any alcoholic beverage to such person . . . who is visibly intoxicated." See C.R.S. § 12-47-801(3)(a)(I); See also Sigman v. Seafood Limited Partnership I, 817 P.2d 527, 530 (Colo. 1991). When a Plaintiff fails to present any evidence that a licensee willfully and knowingly served a visibly intoxicated individual, summary judgment is the proper remedy. Dickman v. JackaLope, Inc., 870 P.2d 1261, 1263 (Colo. App. 1994). As the District Court noted, if the "non-

[1] On March 14, 2007, the Court granted the Defendants' Partial Motion to Dismiss the Plaintiffs' Second and Fourth Claims for relief based on common law theories of negligence per se and Respondeat Superior. See March 14, 2007 Order Re: Defendants' Partial Motion to Dismiss. The Plaintiffs do not challenge on appeal the dismissal of these two claims for relief. Though the Defendants believe the Dram Shop Act, rather than the wrongful death statute, exclusively controls this matter, that issue is not permanently before this Court.

moving 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 Airlines, Inc. v. Keenan, 731 P.2d 708, 713 (Colo. 1987).

In resisting a summary judgment motion, it is true in a Dram Shop action, as it is in most civil lawsuits, that a Plaintiff may rely on direct as well as circumstantial evidence to demonstrate a genuine issue of material fact. See, e.g. Christoph v. Colorado Communications Corp., 946 P.2d. 519, 523 (Colo. App. 1997) (Circumstantial evidence consisted of witnesses observing the intoxicated patron in Defendant's establishment purchasing and consuming large quantities of beer, acting "loud and rowdy" and holding onto the wall when walking). But any evidence, whether direct or circumstantial, must be material and must demonstrate that there is a question of fact. "Even circumstantial evidence must be relevant and must be based on more than surmise, speculation and conjecture." Spray Systems of Arizona, Inc. v. Lin-de, Ltd., 1999 U.S. App. U.S. LEXIS 4553 *9 (10th Cir. 1999); see also Ramirez v. Mixsooke, 907 P.2d. 617, 619 (Colo. App. 1994) (liability cannot be founded upon surmise, speculation and conjecture).

"To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." Bones v.

Honeywell International, Inc., 366 F.3d 869, 875 (10th Cir. 2004). "Mere possibilities leave the solution of an issue of fact in the field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty, . . . There must at least be sufficient evidence to remove the question from the realm of conjecture." Polz v. Donnelly, 121 Colo. 95, 98, 213 P2d 385, 386 (1949).

In the face of the uncontroverted evidence set forth above, the Plaintiffs, in their Opening Brief, contend that Sylvia Aberly admitted after the fatal accident that she sold Mr. Sholes his last beer that evening. Plaintiffs additionally contend that they have demonstrated circumstantially that: (1) it was at least temporally possible for Mr. Dewey and Mr. Sholes to leave the Sholes residence in time to arrive at Firestone Liquors before it closed; (2) Mr. Dewey and Mr. Sholes did indeed buy a 12-pack of beer after they left the Sholes residence which corresponds factually to Ms. Aberly's alleged admission; (3) Mr. Dewey and Mr. Sholes in some fashion had a "habit and routine" of buying beer at Firestone Liquors before driving out to Mr. Dewey's parents' home and thus did so that evening; and finally (4) it was factually impossible for any other liquor store, including one in Hudson, Colorado, to have served as a source of alcohol once the boys left the Sholes residence. As shown below, this spectacular surmise

presented by Plaintiffs' counsel cannot serve to demonstrate that a question of material fact exists precluding the entry of summary judgment in favor of Firestone Liquors.

A. Sylvia Aberly made no admissions in this matter.

Plaintiffs' Opening Brief relies almost exclusively on an erroneous contention that Sylvia Aberly "admitted" after the fact to Tobias Sholes that she sold Mr. Sholes and Mr. Dewey their last 12-pack of beer on the evening in question. Ms. Aberly made no such admission.

The record is clear that Mr. Sholes encountered Ms. Aberly in Firestone Liquors sometime in the summer of 2005. He entered the store to say hello and see how she was doing. Mr. Sholes advised Ms. Aberly that he was fine, but that he was facing a rough road with respect to his criminal prosecution. See August 18, 2007 deposition of Tobias Sholes at 97:21-98:3, attached as Exhibit H to the Defendants' October 3, 2007 Reply in Support of Motion for Summary Judgment (hereinafter "Defendants' Reply Brief"). Mr. Sholes advised Ms. Aberly in no uncertain terms that he was going to prison and that in all likelihood, he was going to receive a long sentence. Id. at 98:4-9. Mr. Sholes also advised Ms. Aberly that Michael Dewey had suffered a spinal cord injury and was undergoing rehabilitation at a Veteran's Administration Center in New Mexico. Id. at 97:17-

20; 99:8-13. The conversation between Mr. Sholes and Ms. Aberly was thus primarily directed at how Mr. Sholes was doing emotionally and how Mr. Dewey was doing physically. Id. at 99:22-100:1.

Mr. Sholes then recalls Ms. Aberly saying something to him along the lines of "Who would have thought that I would have sold you your last 12-pack?" See Exhibit H, Sholes deposition at 102:9-13. Mr. Sholes agreed that at the time of this statement, Ms. Aberly was not expressing any concern for herself or her liquor store, but rather was expressing concern and sadness about Mr. Sholes and Mr. Dewey. Id. at 102:19-24. Mr. Sholes agreed, as he reasonably had to, that Sylvia Aberly could not possibly have had any knowledge or information as to his whereabouts on the evening of February 8 or the early morning hours of February 9, 2005, particularly after she closed her liquor store that night at 10:45 p.m. Id. at 102:25-103:9.

Instead, Mr. Sholes agreed that it was more probable, and indeed highly likely, that Ms. Aberly was simply expressing sadness that given the certain criminal sentence Mr. Sholes was facing, she would not be selling him any more 12-packs of beer. To Mr. Sholes, this interpretation seemed eminently reasonable. Id. at 105:20-106:3. Plaintiffs' counsel asked Mr. Sholes to speculate what Ms. Aberly may have meant, and Mr. Sholes candidly responded:

> I honestly couldn't tell you what she meant from it because it was her that said it.

Id. at 131:2-11.

Sylvia Aberly does not generally dispute that she stated something to Mr. Sholes to the effect that she had sold him his last 12-pack of beer. She explained the reasoning behind this statement as follows:

> I meant I'm never going to see you again, you are going away for a long time.

See September 6, 2007, deposition of Sylvia Aberly at 42:14-23, attached to Defendants' Reply Brief as Exhibit I. Ms. Aberly was expressing to Mr. Sholes the simple fact that given the boys' circumstances, she wasn't going to be selling either of them any more beer. Id. at 42:24-43:2.

It is upon this exchange that Plaintiffs hinge the present appeal. However, there is no disputed question of material fact with respect to what Ms. Aberly said to Mr. Sholes. She has explained her statement that she was not going to sell either him or Mr. Dewey any beer in the foreseeable future. Mr. Sholes was about to be sentenced to 36 years in prison. Mr. Dewey, partially paralyzed, was recovering in a veteran's administration center in the state of New Mexico. Mr. Sholes' own speculation as to what Ms. Aberly may have meant by this statement is neither relevant nor probative of any issues in the lawsuit.

It is preposterous to suggest that Sylvia Aberly could have personal knowledge or foundation to know where Mr. Sholes may have been on the evening in question or where he may have purchased any beer (particularly his "last beer") on the evening of February 8 or the early morning hours of February 9, 2005. What Plaintiffs label an "admission" on her part is simply a factual observation regarding the terrible consequences of a horrible tragedy. Ms. Aberly's statement is not an admission, and cannot serve to create a question of material fact as to whether Mr. Sholes was sold alcohol at Firestone Liquors while visibly intoxicated at any time on February 8, 2005. The only statement made by Ms. Aberly having any relevance to Defendants' Motion for Summary Judgment is her uncontroverted and unrebutted testimony that Firestone Liquors sold no alcohol to Tobias Sholes at any time on February 8, 2005.[2]

B. The chronology of the evening is such that Firestone Liquors could not have sold alcohol to Tobias Sholes.

The Plaintiffs' Opening Brief relies heavily on an assertion that despite the absence of evidence to demonstrate that Tobias Sholes was sold alcohol by

[2] The Plaintiffs attached as Exhibit 3 to their September 11, 2007 Objection to Defendants' Amended Motion for Summary Judgment a memo to Plaintiffs' counsel from Erik Schneider, a criminal investigator hired by Tobias Sholes' criminal attorney, Russell Ray. The plaintiffs relied on this unsworn statement before the trial court and refer to it again in their Opening Brief. The Defendants object to any reference or reliance on this inadmissible and unsupported document. The memo between Mr. Schneider and Plaintiffs' counsel is not competent evidence for purposes of Rule 56. It is not sworn, it is not an Affidavit, and is not in the form of any type of admissible evidence. More importantly, any statements Mr. Schneider might ascribe or attribute to Mr. Sholes are hearsay and thus inadmissible. As such, Exhibit 3 cannot properly be considered by this Court in resolving the present Appeal.

Firestone Liquors while he was visibly intoxicated, the chronological timeline from the evening is such that a sale "could" have happened. Indeed, Plaintiffs' Opening Brief is peppered with the concept that "it is possible", "it is conceivable" or "such a thing could have at least happened."[3] At the end of the day though, the Plaintiffs must do more than demonstrate that the facts they have alleged could possibly be true. They must produce competent and admissible evidence sufficient to avoid summary judgment. This they have not done.

The chronology of the evening of February 8, 2005 is such that Firestone Liquors has more than met its burden on summary judgment of demonstrating that no genuine issue of material facts exists. The Defendants have shown, by unrebutted and uncontested evidence, that Firestone Liquors made its last sale of alcohol at 10:33 p.m., that the cash registered was closed out at 10:44 p.m.,[4] and that Ms. Aberly closed the store and walked out the door that evening at 10:45 p.m. Plaintiff has not presented any evidence to show this timeline to be in any fashion controverted.

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[3] "[S]tatements such as 'could happen' 'might happen' 'it is a possibility' 'I couldn't say absolutely' and similar expressions are evidences of mere possibilities of a fact having occurred or having existed and are not sufficient to support a judgment." Maryland Casualty Co. v. Kravig, 153 Colo. 282, 290, 385 P.2d 669, 674 (1963). "It is not sufficient to show a set of circumstances bringing the theory of appellants within the realm of possibilities." Polz, supra, 121 Colo. at 98, 213 P.2d at 387. "No number of mere possibilities will establish a probability." Denver & Rio Grande Railroad Co. v. Thompson, 65 Colo. 4, 7, 169 P. 539, 540 (1917).

[4] See Exhibit 9 to Plaintiffs' September 26, 2007 Objection to Defendants' Amended Motion for Summary Judgment which includes a February 8, 2005 cash register tape bates stamped FS 0001. This cash register tape shows that a final close out was performed at 22:44, or 10:44 p.m.

Bree Sholes testified in no uncertain terms that Mr. Sholes and Mr. Dewey left her home that evening sometime close to midnight. Mr. Dewey testified that the boys left the Sholes residence sometime between 10:30 p.m. and 11:00 p.m., closer to 11:00 p.m. The minimal discrepancy between the only two witnesses with personal knowledge on this subject is immaterial. Both witnesses have estimated that the two boys left the Sholes residence at a time after Firestone Liquors had made its last sale and closed for the evening. Plaintiffs suggest, again by presenting exclusively surmise, speculation and conjecture, that Firestone Liquors may have been open later than the cash register receipt shows and Ms. Aberly testified, that Mr. Sholes may have left his home at some time earlier than the witnesses testified (making it at least temporally possible for Mr. Sholes to have purchased alcohol at Firestone Liquors), and that indeed Ms. Aberly may have sold alcohol to Mr. Sholes after she closed out the cash register and before she walked out the door.[5]

[5] Plaintiffs' effort to dispute Mrs. Sholes' recollection of the timeline is similarly unavailing. Attached as Exhibit 7 to the Plaintiffs' September 26, 2007 Objection to Defendants' Amended Motion for Summary Judgment is an inadmissible document purporting to constitute a timesheet of Bree Sholes. No foundation was laid for the admissibility of this exhibit. Even if the "associate timesheet report" is accepted for what it is presented to be, a review of that document appears to demonstrate that Bree Sholes clocked out for the evening from her Checker Auto Parts job at 22:15, or 10:15 p.m. Given Mrs. Sholes' best estimates for how long it would have taken her to commute home (20-25 minutes), relax in her bedroom (10-15 minutes), have an argument with Michael Dewey (5 minutes), wait for the boys while they were out in the garage (10-30 minutes), and then observe them depart (5-15 minutes), it is impossible for the two gentlemen to have departed the Sholes residence at any time prior to 11:00 p.m.

The Plaintiffs have not materially controverted the timeline presented by the Defendants, and in any event, the arguments of their counsel miss the point. *Even if the timeline was properly challenged such that the sale of alcohol to Tobias Sholes by Firestone Liquors was possible, this is insufficient to avoid summary judgment. In order to resist the uncontroverted evidence that Tobias Sholes did not purchase any alcohol from Firestone Liquors on the evening in question, Plaintiffs were obligated to present evidence and create a question of material fact demonstrating that he did.* Showing that Mr. Sholes had the "opportunity" or that he "could have maybe" or "possibly" purchased beer at Firestone Liquors at some point in the evening establishes nothing. The Plaintiffs presented the trial court with no testimony, no documents, no affidavits, no evidence of any kind purporting to demonstrate that Tobias Sholes was in Firestone Liquors at any time on February 8, 2005. That failure was and is fatal to their claims.

C. Mr. Dewey testified that any beer purchased after the boys left the Sholes residence was obtained in Hudson, Colorado.

In their Opening Brief, Plaintiffs assert that it was "impossible" for Mr. Dewey and Mr. Sholes to have purchased a final 12-pack of beer at Pit Stop Liquors in Hudson, Colorado. This assertion is based on Affidavits from representatives of Pit Stop Liquors claiming their establishment closed at 10:00 p.m. that evening. Plaintiffs ignore Mr. Dewey's testimony that he believed he

purchased a 12-pack of beer from a liquor store in Hudson, Colorado. Mr. Dewey testified that the liquor store may have been Pit Stop Liquors, but he did not recall the name and was unable to provide precise information. Even if Mr. Dewey and Mr. Sholes did not purchase alcohol at Pit Stop Liquors after they left the Sholes residence at close to midnight on February 8, 2005, such a failure hardly has the effect of establishing that Mr. Sholes did purchase alcohol at Firestone Liquors. There is a universe of liquor stores where Mr. Sholes could have purchased alcohol. See argument D. infra. Mr. Dewey's testimony could not have been clearer that he never returned to Firestone Liquors after his purchase of one 12-pack of beer at approximately 4:45 p.m. on February 8, 2005 at a time when he had consumed no alcohol.

D. Plaintiffs' remaining arguments are without merit.

Plaintiffs' final arguments with respect to what they characterize as circumstantial evidence are similarly without merit. Plaintiffs assert that Mr. Dewey's testimony that the boys purchased a 12-pack of beer after leaving the Sholes residence coupled with Ms. Aberly's statement with respect to the fact that she would not be selling the boys any more 12-packs is somehow of significance. Plaintiffs rely on Mr. Dewey's testimony with respect to the quantum of alcohol, but then disregard his crystal clear testimony that he did not purchase any

subsequent 12-pack from Firestone Liquors. This observation of Plaintiffs' counsel is neither evidence nor circumstantial.

Lastly, Plaintiffs' counsel asserts that Mr. Sholes and Mr. Dewey had a "habit and routine" of buying beer at Firestone Liquors before driving to the farmhouse owned by Mr. Dewey's parents. This is not evidence, nor have they established any habit, routine or practice. Mr. Sholes in fact testified that he frequently bought 12-packs of beer from a drive through liquor store in downtown Frederick, Colorado, that he bought beer from a liquor store next to the Safeway supermarket, and that he bought beer from the Safeway market itself, all of which were located approximately half a mile from his house. See Sholes deposition at 87:7-25. This argument is specious.

II. THE PLAINTIFFS FAILED TO ESTABLISH ANY CAUSAL CONNECTION SUPPORTING THEIR CLAIMS AGAINST FIRESTONE LIQUORS.

The Plaintiffs cannot demonstrate that Firestone Liquors was open later than 10:45 p.m. on February 8, 2005. It is undisputed that the Plaintiffs' decedents were killed in an automobile accident with Tobias Sholes at 5:05 a.m. the next day, over six hours after Firestone Liquors closed for the evening. It is lastly undisputed that Firestone Liquors did not open again on February 9, 2005, until 10:00 a.m., almost five hours after the accident had occurred.

Pursuant to the Dram Shop Act, it was incumbent upon Plaintiffs to establish that the Defendants' sale of alcohol caused the Plaintiffs' damages. Even if Plaintiffs could present some evidence that Firestone Liquors sold alcohol to Tobias Sholes when he was visibly intoxicated (which as set forth above they cannot), the temporal gap between the time Firestone Liquors closed on February 8, 2005 and the time the accident occurred, precludes any showing of causation as a matter of law. For instance, Plaintiffs have failed to demonstrate that Mr. Sholes was not sufficiently intoxicated to cause the accident from the 15 to 18 beers he drank that evening which he purchased on February 7, 2005. Plaintiffs have failed to demonstrate that even if Firestone Liquors had sold alcohol to Mr. Sholes at 10:45 p.m. that such a sale of liquor contributed in any fashion to the fatal motor vehicle accident over six hours later.

A dram shop action against a liquor store differs somewhat from such a cause of action against a bar or tavern. When a patron is over-served in a bar, walks out the door and causes a motor vehicle accident, a causal connection can readily be established. When a liquor store sells alcohol to a patron, what that patron or customer may do with the alcohol after he walks out the door (such as become intoxicated) is irrelevant to a dram shop cause of action.

Here, Plaintiffs have not demonstrated that Mr. Sholes was intoxicated when he left his home on February 8, 2005. Mr. Sholes' wife, Bree Sholes, observed him that evening and, given their relationship, could readily tell when he was showing signs of intoxication. See July 9, 2007 deposition of Bree Sholes at 92:8-14, attached to Defendants' Reply Brief as Exhibit J. When Mr. Sholes walked out the door from the Sholes residence that evening and Bree Sholes kissed him goodbye, Tobias Sholes did not appear to Bree Sholes to be intoxicated. Id. at 92:-15-20. Bree Sholes did not notice any strong odor of alcohol on Mr. Sholes' breath. Id. at 90:8-12. Mr. Sholes' own speculation as to whether he appeared intoxicated given his amnesia that night is of course irrelevant.

The point is that regardless of Mr. Sholes' state at the time Firestone Liquors closed its door at approximately 10:45 p.m., no sale of alcohol to him, even if such a sale could be established, can be causally linked to his decision six hours later to drive while intoxicated and cause the deaths of Plaintiffs' decedents. For this reason, the Court's entry of summary judgment in favor of Firestone Liquors should be affirmed.

III. SCOTT AND SYLVIA ABERLY ARE ENTITLED TO SUMMARY JUDGMENT AS SHAREHOLDERS OF FIRESTONE LIQUORS.

The individual shareholders of Firestone Liquors alternatively sought summary judgment because they were not the actual liquor licensee and because there was no basis for piercing the corporate veil.[6]

Colorado law does not allow claims based solely on a person's status as a shareholder absent facts showing that "piercing the corporate veil" would be appropriate. Leonard v. McMorris, 63 P.3d 323, 330 (Colo. 2003). A corporation is deemed "a separate entity distinct from its officers, directors or investors" and, therefore, "only extraordinary circumstances justify disregarding the corporate entity to impose personal liability." Id. A shareholder of a corporation "may not be held liable for the corporation's tortious acts or breaches of contract merely by virtue of their membership or management authority in the corporation." Krystkowiak v. W. O. Brisben Companies, Inc., 90 P.3d 859, 867 (Colo. 2004).

The Plaintiffs neither alleged, nor did they present any evidence in response to the Defendants' Amended Motion for Summary Judgment establishing a basis for imposing personal liability on the Aberlys. In responding to the Defendants'

[6] The actual holder of the State of Colorado retail liquor license utilized by Firestone Liquors, Inc. to operate as a retail liquor store is Firestone Liquors, Inc. See Aberly Affidavit at ¶2. A copy of Firestone Liquors, Inc.'s retail liquor license is attached to the Defendants' Motion as Exhibit D.

Motion for Summary Judgment seeking dismissal of Scott and Sylvia Aberly, Plaintiffs argued only that "since the Aberly's [sic] are married and co-owners of Firestone Liquors, summary judgment in favor of either Sylvia Aberly or Scott Aberly is premature." See, Plaintiffs' September 26, 2007 Objection to Defendants' Amended Motion for Summary Judgment at ¶ 10. As authority, Plaintiffs cite to "C.R.C.P. rule 56, et al." This argument is meaningless.

Mr. and Mrs. Aberly are entitled to summary judgment for the same reasons Firestone Liquors is entitled to summary judgment. Alternatively, Scott and Sylvia Aberly are entitled to summary judgment because no basis exists under these circumstances to pierce the corporate veil and impose personal liability on them directly.

IV. CONCLUSION

The Defendants fully satisfied their obligation under Rule 56 of the Colorado Rules of Civil Procedure. The Defendants demonstrated that Firestone Liquors sold no alcohol to Tobias Sholes on February 8, 2005 or the early morning hours of February 9, 2005. Sylvia Aberly, who was in the store all day on February 8, 2005, testified that she sold no alcohol to Tobias Sholes. Tobias Sholes testified that all of the alcohol he consumed before he left his home that evening came from a different liquor store. Michael Dewey purchased a 12-pack

of beer from Firestone Liquors at approximately 4:45 p.m., at a time when he had consumed no alcohol. Mr. Dewey testified that neither he nor Mr. Sholes ever returned to Firestone Liquors that night.

Plaintiffs were obligated to demonstrate that these material facts were in dispute and they did not satisfy that obligation. Instead, they relied and continue to rely exclusively on surmise, speculation and conjecture presented through the unsupported arguments of their counsel. For these reasons, the Defendants, Firestone Liquors, Inc., Sylvia Aberly and Scott Aberly, respectfully request that this Court affirm the trial court's entry of summary judgment in their favor.

Respectfully submitted this 11th day of June, 2008.

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CERTIFICATE OF MAILING

I hereby certify that on this 11th day of June, 2008, a true and correct copy of the foregoing **ANSWER BRIEF** was deposited in the United States Mail, postage prepaid, addressed to the following:

F. Lee Maes, Esq.
1100 South Shoshone
Denver, CO 80223

By: _____