COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80202 District Court, County of Weld The Honorable Daniel S. Maus District Court Case No. 2006CV81	2008 JUL 14 P 12:45
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 ^ Court of Appeals Case No. 2008CA000019
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PETITIONER-APPELLANTS REPLY BRIEF

Submitted this 10th day of July, 2008

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STATEMENT OF THE FACTS

This case concerns the tragic deaths of two young adults, who died in the early morning hours of February 9, 2005, when their car was hit head on by a car driven by Tobias Sholes. Plaintiff-Appellants allege that Defendant Firestone Liquors, Inc. sold Sholes and his friend Michael Dewey a 12-pack of beer at approximately 10:30 p.m. the prior evening, at a time when both men were visibly intoxicated. In the instant appeal, Plaintiff-Appellants ("Plaintiffs") challenge the order of summary judgment entered in favor to the Defendant-Appellees ("Defendants"). In their opening brief, Plaintiffs openly acknowledged that, as required by Colorado law, the facts set forth in their statement of facts were viewed in the light most favorable to the Plaintiffs. Opening Brief, p3, n.1 (citing *Continental Divide Ins. Co. v. Dickinson*, 179 P.3d 202, 204 (Colo. App. 2007)). In their answer brief, Defendants decline to give any credence to the interpretation of facts advanced by Plaintiffs, and instead present the facts in the light most favorable to the defense. As shown below, many of the "facts" set forth by Defendants are in dispute and, when viewed in the light most favorable to the Plaintiff-Appellants, should be rejected by this Court.

In their answer brief, Defendants assert that:

> . . . [After purchasing beer from Firestone Liquors on the afternoon of February 8, 2005] Mr. Dewey did not return to Firestone Liquors at any time later on February 8, 2005 . . . Aberly Affidavit 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.

Answer Brief at 6 (emphasis in original). Plaintiffs do not deny that these assertions are contained in the affidavits and depositions of Aberly and Dewey. However, the credibility of those witnesses is at issue, as Aberly and her business are defendants in the case, and Dewey, on the night in question, not only consumed more than one full case of beer, but also suffered a concussion and a brain injury which, by his own admission, caused him to forget some the events and circumstances surrounding the evening (Defendants' Motion, Exhibit F, Deposition of Michael Dewey, p53).

In addition to motive, bias, and other credibility issues surrounding Defendants' witnesses, there are glaring inconsistencies between the "facts" described in Defendants' answer brief, and the evidence marshaled by Plaintiffs, which clearly indicates that Sholes and Dewey purchased their final 12-pack at Firestone Liquors.

Plaintiffs' evidence includes, most prominently, Sylvia Aberly's admission of liability in this case. Six months after the accident in this case, Aberly admitted to Michael Sholes that she "sold you guys your last 12 pack" (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p37, 39).

In addition to Aberly's admission, which constitutes direct evidence of liability, *Mitchell v. People*, 76 Colo. 346, 232 P. 685, 687 (Colo. 1925), the 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. (Plaintiffs' Objection, Exhibit 6, affidavit of Michael Dewey), coupled with Aberly's presence in the store until approximately 10:56 p.m. (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p27-28); (2) the joint purchase by Sholes and Dewey of a 12-pack, a quantity identical to that referenced by Aberly in her subsequent statement to Sholes (Defendants' Motion, Exhibit F, Deposition of Michael Dewey, p10-11, 59); (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 (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p46-47); (4) the impossibility of Pit Stop Liquors, which closed at 10:00 p.m. on February 8, 2005, serving as the source of the final 12-pack purchased by

Sholes and Dewey (Plaintiffs' Objection, Exhibits 4, 5, Affidavits and Business Records relating to Pit Stop Liquors).

Contrary to the principle that, for summary judgment purposes, the facts must be viewed in the light most favorable to the nonmoving party, Defendants ask this Court to reject the copious evidence of liability. Specifically, Defendants ask this Court to credit Aberly's subsequent explanation, offered at her deposition, that her statement to Sholes 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). Answer Brief at 18. 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. Although Defendants argue, in their answer brief, that Aberly's statement to Sholes reflects her awareness that Dewey was in a spinal rehabilitation facility, Answer Brief at 16-18, Aberly testified at her deposition that she had no recollection of any discussion regarding Dewey's injuries (Plaintiffs' Objection, Exhibit 2, Deposition of Sylvia Aberly, p35).

Defendants also maintain that Aberly's statement could not qualify as an admission, because Aberly could not have known where Sholes purchased his "last 12 pack" prior to the fatal car accident. Answer Brief at

19. Assuming that Sholes and Dewey purchased a 12-pack at approximately 10:30 p.m. on February 8, 2001, Defendants' assertion is false. If that beer sale had been made, Aberly would have known that she sold beer to Sholes late on the evening of February 8, 2005, and likewise would have been aware, from press accounts, that the fatal accident occurred in the early morning hours of February 9, 2005 (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p57). Thus, while Aberly would not have known, to an absolute certainty, that she sold Sholes his "last 12 pack" prior to the accident, such an assumption would have been reasonable at the time of her statement to Sholes.

Defendants also ask this Court to credit the testimony of Bree Sholes that the two men left close to 11:00 p.m., too late to buy beer at Firestone Liquors. Answer Brief at 6-8. However, acceptance of this evidence would necessitate the simultaneous rejection of Michael Dewey's sworn affidavit, in which Dewey attested that he and Sholes left the Sholes residence at approximately 10:30 p.m. (Plaintiffs' Objection, Exhibit 6, Affidavit of Michael Dewey, par. 11) ("At approximately 10:30 p.m., Mr. Sholes and I got into my pick-up truck . . ."). Based upon the principle that, for summary judgment purposes, the evidence must be viewed in the light most favorable to the nonmoving party, this Court should favor Dewey's affidavit over Sholes' deposition testimony.

Defendants also ask this Court to find that Michael Dewey testified, generally, that he and Sholes bought the final 12-pack in Hudson, Colorado, and to reject the fact that Dewey stated, specifically, that the beer was purchased at Pit Stop Liquors. Answer Brief at 9, 22-23. This distinction is important because Pit Stop Liquors closed at 10:00 p.m., and thus could not have been the source of the final 12-pack. The record reflects that Michael Dewey, in his March 26, 2007, affidavit, specified that the final 12-pack was purchased "in Hudson, Colorado at a liquor store near the intersection of I-76 and Highway 52" (Plaintiffs' Objection, Exhibit 6, Affidavit of Michael Dewey, par. 11). Thereafter, at his July 19, 2007 deposition, Dewey was shown a photograph of the intersection of I-76 and Highway 52, at which time he identified Pit Stop Liquors as the source of the final 12-pack (Defendants' Motion, Exhibit F, Deposition of Michael Dewey, p14-15). At the conclusion of Dewey's deposition, the following exchange occurred:

> **Plaintiffs' Counsel:** And just for the record, as I understand it, Mr. Dewey, there's no doubt in your mind that the second and only beer that you purchased on the evening of February 8, 2005, or early morning hours of February 9, 2005, was in Hudson, Colorado, at Pit Stop Liquors; Is that correct?
>
> **Michael Dewey**: That's correct.

(Defendants' Motion, Exhibit F, Deposition of Michael Dewey, p58-59).

ARGUMENT

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

In their answer brief, Defendants challenge the probative value of each evidentiary item listed in the opening brief. As shown below, Defendants' arguments are misplaced.

A. Aberly's Admission is Direct Evidence of Liability

In their answer brief, Defendants attempt to construe Aberly's statement that she "sold you guys your last 12 pack" in a benign, non-inculpatory manner. Answer Brief at 16-18. As shown above, the interpretation advanced by Defendants is non-sensical, and likely to be rejected by a jury. Defendants also maintain that the statement cannot be accepted at face value, because Aberly was not in a position to know whether the 12-pack purchased at approximately 10:30 p.m. on February 8, 2001, was the last 12-pack purchased before the fatal accident. Answer Brief at 19. However, as noted above, the 12-pack purchase occurred late on the evening of February 8, 2005, and the fatal accident occurred in the early morning hours of February 9, 2005. Therefore, Aberly *was* in a position to assume that the 12-pack sold to Sholes and Dewey was the last one

purchased before the accident. As it turned out, Aberly's assumption was correct.

Aberly's admission constitutes direct evidence of liability. *Mitchell v. People*, 76 Colo. 346, 232 P. 685, 687 (Colo. 1925). Indeed, an admission is "always convincing because . . . it is the voice of one whose senses took cognizance of the facts . . ." *Id. See also Oregon v. Elstad*, 470 U.S. 298, 311 105 S.Ct. 1285, 1294-95, 84 L.Ed.2d 222 (1985) (recognizing that a voluntary confession is "highly probative evidence"). Here, the trial court failed to interpret Aberly's admission in the light most favorable to the Plaintiffs, and also failed to consider the effect of that admission upon the issue of liability. The admission itself, or in combination with the other evidence in the case, merits reversal of the trial court's judgment.

B. Aberly's Admission is Corroborated by Circumstantial Evidence

In addition to Aberly's admission, the Plaintiffs have presented circumstantial evidence that Sholes and Dewey purchased a 12-pack at Firestone Liquors several hours prior to the fatal accident. 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 joint 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, which closed at 10:00 p.m. on February 8, 2005, serving as the source of the final 12-pack purchased by Sholes and Dewey. In their answer brief, Defendants argue that none of this evidence has probative value. Answer Brief at 19-24. As shown below, Defendants' argument is incorrect.

1. The Opportunity to Purchase the 12-Pack

There is no dispute that Sholes and Dewey purchased a 12-pack of beer after leaving the Sholes residence, but the parties disagree as to where that beer was purchased. Defendants argue, somewhat inconsistently, that "the chronology of events" favors their position that Firestone Liquors was closed when Sholes and Dewey left the Sholes home, and that any evidence that "the chronology of events" favors Plaintiffs is lacking in probative value. Answer Brief at 19-22.

Defendants' claim that the sequence of events favors the defense is based exclusively upon Bree Sholes, who testified that her husband and Dewey left the Sholes home close to 11:00 p.m. However, in Michael Dewey's sworn affidavit, he attests that he and Sholes left the Sholes residence at approximately 10:30 p.m. Thus, the evidence, when viewed in the light most favorable to the Plaintiffs, shows that Firestone Liquors was

located approximately 400 yards from the Sholes home, that Sholes and Dewey left the Sholes home at approximately 10:30 p.m., and that Aberly was present in the store until approximately 10:56 p.m.[1] Under these circumstances, Sholes and Dewey had an opportunity to purchase the last 12-pack at Firestone Liquors, from Sylvia Aberly.

Under Colorado law, evidence of an opportunity to commit an act is probative of whether the act was actually committed. *See* CRE 404(b) (evidence of other acts admissible to show "opportunity"); *People v. Rivers*, 70 P.3d 531, 538 (Colo. App. 2002) ("Defendant's presence at the tavern on the day of the shooting and his possession of a gun on that date are relevant to establish that he had the necessary means and opportunity to commit the crime"). Here, the evidence showed that Sholes and Dewey had the opportunity to purchase the final 12-pack from Aberly, and the trial court erred in failing to recognize that this evidence served to corroborate Aberly's admission of liability.

2. The Purchase of a 12-Pack by Sholes and Dewey

The Defendants do not dispute that, on the night of February 8, 2001, Sholes and Dewey purchased a 12-pack of beer, a quantity identical to that

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[1] Although Aberly closed out her register at 10:44 p.m., 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).

referenced by Aberly in her subsequent admission of liability. Clearly, beer is sold in many different quantities. Indeed, during the afternoon preceding the fatal accident, Sholes was drinking from a 20-pack of beer, which he had purchased the previous day (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p25). Therefore, the match between the quantity referenced by Aberly and the quantity actually purchased tends to show that Aberly was the source of the last 12-pack.

3. The Habit of Buying Beer at Firestone Liquors

At his deposition, Sholes testified that, when he and Dewey drove to the farmhouse owned by Dewey's parents, it was their "habit to purchase alcohol before [they] left" (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p46-47). In addition, Sholes stated that he "frequently" purchased beer from Firestone Liquors, a store located 400 yards from his home, and that he only "occasionally" purchased beer from other liquor-selling establishments (Defendants' Motion, Exhibit B, Deposition of Tobias Sholes, p87). Defendants argue that this purchasing pattern does not reflect a "habit" of buying beer at Firestone Liquors, pursuant to Colorado Rule of Evidence 406. Answer Brief at 23.

CRE 406 provides that "evidence of the habit of a person" is relevant to prove that the conduct of the person on a particular occasion was in

conformity with the habit. Plaintiffs maintain, pursuant to CRE 406, that evidence of Sholes' habit of buying beer at Firestone Liquors is relevant to prove that he did so on the evening of February 8, 2008. In addition, Plaintiffs maintain that Sholes was an alcoholic (Defendants' Motion, Exhibit B, Deposition of Michael Dewey, p75), and that as on the date in question, Sholes was often intoxicated when he purchased beer from Aberly. Therefore, evidence of Aberly's prior beer sales to Sholes is admissible to show a common scheme or plan. *See Cluff v. State*, 16 Ariz. 179, 142 P. 644, 645-46 (Ariz. 1914) (in prosecution for sale of intoxicating liquor, evidence of prior sales admissible to show common plan); *Lewis v. State*, 32 Ariz. 182, 256 P. 1048, 1052 (Ariz. 1927) ("series of sales of intoxicating liquor shown to establish that defendant did sell the particular liquor charged" is admissible to show common scheme or plan). Here, the evidence of prior beer sales was admissible to show Sholes' habit of buying beer from Firestone Liquors, and Aberly's common plan to sell him beer when he was intoxicated. Therefore, the trial court erred in failing to consider this corroborating evidence.

4. The Impossibility of Pit Stop Liquors Selling the Last 12-Pack

Defendants do not dispute that Pit Stop Liquors was closed at the time that Sholes and Dewey purchased the last 12-pack. However, Defendants ask this Court to find that the beer was purchased somewhere else in

Hudson, Colorado. This argument ignores the fact that, at his deposition, Dewey was shown a photograph of the Hudson intersection that he had identified as the location of the beer purchase, and that he testified there was "no doubt in [his] mind" that Pit Stop Liquors was the source of the final 12-pack.

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). The exclusion of Pit Stop Liquors as the source of the final 12-pack significantly increases the likelihood that Firestone Liquors -- a store where Sholes "frequently" purchased beer -- was the source. Here, the trial court erred in failing to consider the evidence definitively proving that Pit Stop Liquors did not supply the final 12-pack, and in failing to consider the effect of this exclusion upon the claims leveled against Firestone Liquors.

"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 evidence demonstrated a material dispute between the parties regarding the source of the final 12-

pack, and the trial court lacked authority, at this stage in the proceedings, to find that Firestone Liquors was not the source of this beer. Therefore, the trial court erred in granting summary judgment, and the judgment should be reversed.

II. PLAINTIFFS ESTABLISHED A CAUSAL CONNECTION SUPPORTING THEIR CLAIMS AGAINST FIRESTONE LIQUORS

In their answer brief, in an argument not addressed by the trial court, Defendants maintain that Plaintiffs have failed to establish a causal connection between their conduct, and the deaths of Zuri Flores and Isai Flores-Bermudez. Answer Brief at 24-25. Specifically, Defendants maintain that there is insufficient evidence of visible intoxication, and insufficient evidence that the beers purchased by Sholes and Dewey contributed to their level of intoxication. Defendants misstate the evidence.

The deposition testimony elicited in this case shows that, at the time Sholes left his residence, he had consumed between 12 and 15 beers from his refrigerator (Plaintiffs' Objection, Exhibit 1, Deposition of Tobias Sholes, p112), and that 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). Regarding the consumption of the final 12-pack, the evidence shows that during the drive to the farmhouse, Sholes and Dewey began to consume the contents of

the 12-pack (Defendants' Motion, Exhibit B, Deposition of Tobias Sholes, p48-49, 86; Exhibit F, Deposition of Michael Dewey, p30). They arrived at the farmhouse at approximately 2:30 a.m., in the early morning hours of February 9, 2005, at which time they drank more of the beer contained in the 12-pack (Plaintiffs' Objection, Exhibit 11, Deposition of Michael Dewey, p30). Under these circumstances, there was ample evidence to support a finding of causation. *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, evidence was sufficient to present genuine issues of material fact, and therefore trial court erred in granting summary judgment in favor of defendant-vendors).

III. SCOTT AND SYLVIA ABERLY MAY BE SUBJECT TO PERSONAL LIABLITITY

In an argument not addressed by the trial court, Defendants maintain that the only potentially liable party in this case is Firestone Liquors, Inc., and that Scott and Sylvia Aberly may not be held personally liable. Answer Brief at 27-28. In support of this proposition, Defendants argue that shareholders of a corporation may not be held liable in the absence of facts showing that "piercing the corporate veil" would be appropriate. Defendants' argument is premature.

A corporate veil may be pierced under appropriate circumstances. *Leonard v. McMorris*, 63 P.3d 323, 330 (Colo. 2003). Those circumstances include situations where "the corporate entity has been used to defeat public convenience, or to justify or protect wrong, fraud, or crime, or in other similar situations where equity requires." *Reader v. Dertina and Associates Marketing, Inc.*, 693 P.2d 398, 399 (Colo. App. 1984); *accord*, Fletcher, Fletcher Cyclopedia Corporations, §41 (2004). The determination of whether to pierce a corporate veil is made by the trial court, in an equitable proceeding. *In re Phillips*, 139 P.3d 639, 644 (Colo. 2006); *Water, Waste, and Land, Inc. v. Lanham*, 955 P.2d 997, 1004 (Colo. 1998).

Here, the evidence suggests that Sylvia Aberly, and perhaps Scott Aberly as well, have used the corporate structure to perpetrate the crime of violating C.R.S. §12-47-901, the criminal analogue to the Dram Shop Act, which makes it illegal to "sell . . . any alcoholic beverage to a visibly intoxicated person." In addition, under the circumstances presented in this case, which concerns the death of two innocent young people, other equitable grounds may justify the piercing of the corporate veil. In any event, the issue of summary judgment is premature, as the determination of individual liability will necessarily be determined by the trial court, in an equitable proceeding, at the conclusion of the case, and will only be required if the jury has returned a verdict against the corporation.

CONCLUSION

Wherefore, for the foregoing reasons, as well as those stated in their opening brief, Plaintiffs ask this Court to reverse the judgment in favor of Defendants, and to remand this matter for trial.

Dated this 12th day of July, 2008.

Respectfully submitted,

[signature]

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **PETITIONER-APPELLANTS REPLY BRIEF** by First Class Mail on July 10th, 2008, to the following:

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