SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 (720) 625-5150	DATE FILED: October 27, 2017 4:02 PM FILING ID: E4A3D6E33381F CASE NUMBER: 2017SC15
Appeal From: District Court, Boulder County, Colorado, Case No. 2012CV540, The Hon. Bruce Langer and The Hon. Judith L. LaBuda	
JARED J. PRZEKURAT, by and through his Parent, Co-Guardian, Co-Conservator and Next Friend, JEROME PRZEKURAT, Petitioner, v. **SAMUEL S. STIMSON, MITCHELL DAVIS, CHRISTOPHER TORRES, PETER STIMSON, and JOHN DOE (1-10) and JANE DOE (1-10), Whose True Identities are Unknown, and JOHN DOE (1-10) and JANE DOE (1-10) ESTABLISHMENTS, Whose True Identities are Unknown**. Respondents.	▲ **COURT USE ONLY** ▲
Attorneys for Petitioner: A. Troy Ciccarelli, Esq., #19713 CICCARELLI & ASSOCIATES, P.C. 2616 West Alamo Avenue Littleton, CO 80120 (303) 806-6556 (303) 295-8989 Fax attorneys@c-alaw.com Timms R. Fowler, Esq., #15983 THE FOWLER LAW FIRM, LLC 155 East Boardwalk Drive, Suite 300 Fort Collins, CO 80525 (970) 232-3322 (970) 232-3101 Fax timmsf@comcast.net	Case No. 2017SC15

PETITIONER'S OPENING BRIEF

Petitioner, Jared J. Przekurat, by and through his Parent, Co-Guardian, Co-Conservator and Next Friend, Jerome Przekurat, by and through his attorneys, A. Troy Ciccarelli, Ciccarelli & Associates, P.C. and Timms R. Fowler, The Fowler Law Firm, LLC, hereby respectfully submit their Opening Brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

☑It contains 9449 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☑ For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not an entire document.

❑ In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with the appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ *Timms R. Fowler*
Timms R. Fowler

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I. STATEMENT OF THE ISSUE

Whether the court of appeals negated the duty imposed by H.B. 05-1183 (C.R.S. §12-47-801(4)(a)(I)) upon social hosts not to provide "a place" for underage drinking where the hosts threw a party and opened the venue to anyone of any age by requiring "actual knowledge" of a specific guest's age.

II. STATEMENT OF THE CASE

A. Nature of the Case.[1]

This case focuses on the application of the amendments to the Dram Shop Act made by H.B. 05-1183 (**Appendix 1**) that created liability for social hosts that knowingly provide "a place" for underage drinking. The amendments were intended to close the "loophole" created by *Forrest v. Lorrigan*, 833 P.2d 873, 875 (Colo.App. 1992) that refused to impose liability for merely providing a place for underage social guests to drink where there was not "control over or an active part in supplying" the alcohol to a minor.

The 2005 amendments created social host liability for providing "a place" or venue for underage drinking to protect against the loss of life associated with such

[1] The procedural history and facts are below.

conduct. The legislative testimony proffered by Przekurat made clear that the 2005 amendments addressed the holding and "loophole" created by *Forrest*.

The court of appeals inexplicably, however, did not address *Forrest* or the legislative history of the 2005 amendments that evidence the General Assembly's clear intent to both broaden the scope of social host liability and reduce the standard required to impose social host liability. The court of appeals also failed to construe the amendments as a whole to give content to the General Assembly's intent.

Finally, the court of appeals misconstrued the plain text of the 2005 amendments finding them unambiguous and refused to even consider the legislative testimony from a host of witnesses stating underage drinking was a statewide dilemma and the *Forrest* case needed to be remedied.

Przekurat seeks review of the Defendants' respective summary judgments as affirmed.[2]

B. The record as addressed by the court of appeals.

Defendants, Samuel Stimson (who was underage), Mitchell Davis, Chris Torres, and Peter Stimson, were college-age men who rented a house together on Moorhead Avenue, in the Martin Park Neighborhood of Boulder. They co-hosted

[2] Przekurat, however, did not abandon the issue whether the Defendants knowingly served Sieck.

a party at their rental home, where they openly provided beer to all guests. Slip op. at ¶¶6, 34. Hard liquor was open and available to all guests as well as set forth below in the Statement of Facts, but that fact was not noted by the court of appeals.

Invitations were extended by word of mouth, mass text message, telephone, flyers, and Facebook postings without any limitations. *See* slip op. at ¶34 (bullet point three); CF, p. 856, ¶7.[3] Defendants had authority to invite whomever they wanted without restrictions. CF, p. 856, ¶8. Defendants made no effort to limit invitations to 21 year old guests. Slip op. at ¶¶7, 34 (bullet points three and six).

Defendants made no effort to preclude anyone, including underage guests, from entering the premises freely and consuming the two kegs of beer openly provided by Defendants. *Id.* at ¶¶6, 34. Bottles of Jim Beam and vodka were circulating freely at the party, which was not acknowledged by the court of appeals. CF, p. 854, ¶4.

Although the opinion does not acknowledge the fact, undisputed evidence established that a *total* of some 16 underage guests entered the party venue unrestricted. Moreover, the beer admittedly served by the Defendants and the hard liquor on the premises were openly available to the underage guests without limitation. CF, p. 860, ¶32.

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[3] These citations are to Przekurat's Response Brief in the trial court, which by way of footnotes refer to the appended deposition testimony.

Torres, Davis, and Peter Stimson all knew that Samuel Stimson (their housemate and Peter's brother) was under the age of 21, was a co-host, and would be attending the party. Slip op. at ¶¶ 3, 34; *see also* Statement of Facts below. However, while the slip opinion notes that Samuel was a co-host (slip op. at ¶3), it does not set forth that he, himself as a co-host, invited an underage guest. *Compare* slip op. at ¶34 *with* CF, p. 859, ¶27.

Samuel Stimson invited Steven Maury, who likewise was underage, and both Samuel and Maury were provided with and consumed alcohol on the Defendants' premises. CF, p. 859, ¶28. Samuel and Maury consumed Samuel's marijuana as well. *Id*. These facts were not acknowledged by the court of appeals.

The opinion also does not set forth that the only alcohol Sieck consumed that night was alcohol provided at Defendants' party, and Sieck was 100% sober prior to going to the party. CF, pp. 857-58, ¶18. Mejia, an under-aged friend of Sieck's, personally saw him drinking beer from a red Solo cup while at the party and estimated Sieck drank six to nine beers and shots at the party. CF, p. 858-59, ¶24.

Mario Ferrara was a freelance photographer and took 20 photographs at the party. CF, p. 860, ¶30 (**Appendix 2)** CF, pp. 1941-60. Photographs depict bottles of what appear to be hard alcohol. CF, pp. 1946, 1950, 1959.

Przekurat attended the party with Sieck. Slip op. at ¶¶6-7. They arrived at about 10:00 p.m., and after about four hours, they left about 2:00 a.m. with Sieck

driving Przekurat's car. CF, p. 858, ¶22. The party ranged in size from 30-120 guests. Slip op. at ¶34 (first bullet point). However, as set forth below in the Statement of Facts, later acquired testimony from Leticia Uzeta showed the party was as small as 10-15 guests and that about the maximum number was 20 people during "the entire night." CF, pp. 2218, depo. p. 18, ll.2-8 and p. 20, ll.14-25, to p. 21, l.1.

Sieck was drunk, lost control of the car, and Przekurat was catastrophically injured. Slip op. at ¶8, n.2. A letter describing Przekurat's injuries from Craig Rehabilitation Hospital (CF, p. 861, ¶36) and a photograph of him (CF, pp. 1063-64) are attached as **Appendix 3**).

C. The district court's procedural history and statement of facts.

1. Defendants' Motions for Summary Judgment.

Torres argued that under C.R.S. §12-47-801, Przekurat had to show his "actual or active knowledge, rather than some form of inferred or constructive knowledge" that an under-aged person, here Sieck, was drinking at his home. CF, pp. 752, 759.

On similar grounds, Defendant Peter Stimson moved for summary judgment on October 24, 2013. CF, pp. 763-67. Peter, however, admitted that "[n]umerous individuals were invited to the party by the Defendants and approximately 30-120

individuals attended." CF, p. 764, ¶2. Peter also admitted that "[a]lcohol was provided at the party by the Defendants." CF, p. 764, ¶2.

Defendant Davis moved for summary judgment. CF, pp. 769-87. Davis argued that there was insufficient evidence to establish that he invited Sieck, knowingly served Sieck, knowingly provided him a place to drink, or knew Sieck was underage. CF, pp. 771-73.

Defendant Samuel Stimson, who was underage, moved for summary judgment on similar grounds. CF, pp. 788-826. Samuel, however, admitted that upon the occasion of Davis' 24th birthday, and the graduation of Torres from college, the roommates invited some of their friends over to celebrate. CF, pp. 795-96, ¶1.

Samuel admittedly invited one friend, Steven Maury, over to his home for the party. CF, p. 796, ¶2. But, Samuel contended that "in order for liability to attach, a defendant must have had actual knowledge that they were providing a place to consume alcohol to a specific person, and they must have had actual knowledge that the specific person to whom they were providing a place to consume alcohol was under the age of twenty-one." CF, p. 807. (Emphasis in original).

2. Statement of the Facts, Przekurat's opposing evidentiary proffer, and his Combined Response.

On November 18, 2013, Przekurat filed his Combined Response" to Defendants various motions for Summary Judgment. CF, pp. 853-1078. Przekurat asserted that there was a genuine issue of material fact as to whether Defendants knowingly served any alcoholic beverages to Sieck. Przekurat also asserted that there was a genuine issue of material fact as to whether Defendants knowingly provided a person under the age of 21 a place to consume alcoholic beverages. CF, p. 863.

a. The open "kegger" party and photos of Solo cups in use, available bottles of hard liquor, and some party "revelers."

1. The Defendants (Samuel Stimson, Mitchell Davis, Christopher Torres, and Peter Stimson) held the leasehold in the premises at 3505 Moorhead Avenue, Boulder, Colorado from August 1, 2010 to August 13, 2011. CF, p. 85, ¶1.[4]

2. On June 17 and 18, 2011, the Defendants hosted a party at their house for Davis' birthday, and to celebrate Torres' and Fix's graduation from the University of Colorado. CF, p. 854, ¶2.[5]

[4] *See* Lease at CF, p. 874-80.

[5] Ex. 2, Fix depo., CF, pp. 881-90. *See* CF, p. 883, p. 18, ll. 8-22; ¶¶1-2 of Samuel Stimson's Undisputed Facts in his Motion for Summary Judgment, CF, p. 795-96, and ¶2 of Peter Stimson's Motion for Summary Judgment, CF, pp. 763-64.

3. Several Defendants purchased and provided at least two kegs of beer for consumption at the party with the aid of Fix because Fix had a "hook-up" at the Boulder Beer Company. CF, p. 854, ¶3.[6]

4. Bottles of Jim Beam and vodka were circulating freely at the party. CF, p. 854, ¶4.[7]

5. Defendants, including Fix, titled the party as "Mitch-A-Palooza" taken from the movie *Old School*. CF, p. 855, ¶5.[8]

6. The size of the party was estimated to be between 30 and 120 attendees and there was at least one professional DJ who performed. CF, p. 855,

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[6] Ex. 2, Fix depo., CF, p. 881, p. 9, ll. 6-22, CF, p. 884, p. 22, ll. 11-25, CF, p. 884, p. 23, ll.1-6; Ex. 3, Torres depo., CF, p. 893, p. 17, ll. 8-22, CF, p. 893, p. 18, ll. 2-15; Ex. 4, Peter Stimson depo., CF, p. 898, p. 14, ll. 13-24, CF, p. 898, p. 15, ll.1-15, CF, p. 898, p. 16, ll.1-23, CF, p. 900, p. 27, ll. 22-23; Ex. 5, Catuccio's Affidavit and depo., CF, p. 907, p. 22, ll. 12-23, CF, p. 907, p. 23, ll. 6-23, CF, p. 907, p. 24, ll. 14-22.

[7] Ex. 2, Fix depo., CF, p. 886, p. 30, ll. 19-23; Ex. 3, Torres depo., CF, 893, p. 19, ll. 5-7; Ex. 6, S. Stimson depo., CF, p. 910, p. 17, ll. 18-25, CF, p. 910, p. 18, ll. 1-22; Ex. 7, Tran depo., CF, p. 921, p. 40, ll. 21-23; Ex. 8, Mejia depo., CF, p. 939, p. 116, ll. 23-25, CF, p. 940, p. 119, ll. 10-25, CF, p. 940, p. 120, l. 1; Exh. 9, Sieck depo., CF, p. 946, p. 37, ll. 2-16; Ex. 10, Ferrara depo., CF, p. 948, p. 25, ll. 13-25; Ex. 11, photos, CF, pp. 955, 968, pp. 6, 19; Ex. 12, Despard depo., CF, p. 971, p. 13, ll. 24-25, CF, p. 971, p. 14, ll. 1-23, CF, p. 972, p. 27, ll. 4-10; Ex. 13, PD Case Report, CF, pp. 1004-05, pp. 1007-08, p. 31-32, 34-35.

[8] Ex. 2, Fix depo., CF, p. 882, p. 16, ll. 7-19, CF, p. 883, p. 17, ll. 1-11; Ex. 3, Torres depo., CF, p. 891, p. 12, ll. 16-22, CF, p. 892, p. 13, ll. 1-7, CF, p. 892, p. 15, ll. 8-16; Ex. 4, P. Stimson depo., CF, p. 900, p. 26, l. 25 - p. 27, l. 11; Ex. 6, S. Stimson depo., CF, p. 910, p. 18, ll. 23-25, CF, p. 910, p. 19, ll. 1-10; Ex. 14, 09/10/13 Davis depo., CF, p. 1035, p. 21, l. 23 - p. 22, l. 2.

¶6.[9] However, later obtained testimony from Ms. Leticia Uzeta showed the party was as small as 10-15 guests and that about the maximum number was 20 people during "the entire night." Pzrekurat Motion to Reconsider Fix Summary Judgment Grant (CF, pp. 2209, ¶8, n.2 [Ex. 2 trancript at CF, pp. 2218, depo. p. 18, ll.2-8 and p. 20, ll.14-25, to p. 21, l.1]. That evidence, in part, created a disputed issue of fact as to Defendant Fix as noted by Judge Labuda. CF, p. 2259 (third full para.); *see also* Motion to Alter/Amendment Judgment and Reconsider CF, p. 2209, at ¶8.

7. Party invitations were made by word of mouth, text message, mass text message, telephone calls, flyers, and Facebook postings. CF, p. 856, ¶7.[10]

8. All Defendants had full authority to invite whomever they wanted without restrictions. CF, p. 856, ¶8.[11]

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[9] Ex. 2, Fix depo., CF, p. 882, p. 14, ll. 17-20; Ex. 3, Torres depo., CF, p. 895, p. 28, l. 25, CF, p. 896, p. 29, ll. 1-3; Ex. 4, P. Stimson depo., CF, p. 902, p. 31, ll. 19-21; Ex. 6, S. Stimson depo., CF, p. 912, p. 26, ll. 19-21; Ex. 7, R. Tran depo., CF, p. 916, p. 9, ll. 22-25, CF, p. 916, p. 10, l. 1, , CF, p. 917, p. 14, ll. 1-12, CF, p. 919, p. 22, ll. 2-25, CF, p. 919, p. 23, ll. 1-10; Ex. 8, Mejia depo., CF, p. 930, p. 24, ll. 3-14; Ex. 14, Davis depo., CF, p. 1037, p. 31, ll. 18-22; Ex. 15, N. Tran depo., CF, p. 1040, p. 13, ll. 9-14; Ex. 16, Doyle depo., CF, p. 1042, p. 15, ll. 10-17.

[10] Ex. 2, Fix depo., CF, p. 883, p. 19, ll. 11-18; Ex. 3, Torres depo., CF, p. 894, p. 22, ll. 17-19; Ex. 4, P. Stimson depo., CF, p. 900, p. 26, ll. 1-6; Ex. 5, Catuccio Aff. and depo., CF, p. 908, p. 45, ll. 24-25; Ex. 6, S. Stimson depo., CF, p. 909, p. 14, ll. 4-25, CF, p. 909, p. 15, ll. 1-3; Ex. 7, R. Tran depo., CF, p. 915, p. 8, ll. 3-12, CF, p. 925, p. 74, ll. 1-22; Ex. 14, Davis depo, CF, p. 1038, p. 33, ll. 17-21.

[11] Ex. 4, P. Stimson depo. CF, p. 900, p. 28, ll. 7-15; *see also* paragraph 10 below and footnote 13, which states in the Opening Brief as follows: Ex. 2, Fix

9. It was anticipated for invited guests to bring friends with them to big keg parties. CF, p. 856, ¶9.[12]

10. Fix had full authority from the Defendants to invite whomever he wanted to the party, including invitees under the age of 21. CF, p. 856, ¶10.[13]

11. Fix invited Victor Mejia, who was under the age of 21, to the party without any restriction to the invitation. CF, p. 856, ¶11.[14]

12. Fix expected Mejia to bring others with him to the party because Mejia was not going to be driving to the party. CF, p. 856, ¶12.[15]

13. Fix did not tell Mejia he could not bring friends, but Fix did not openly invite them himself. CF, p. 856, ¶13.[16]

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depo., CF, p. 887, p. 42, ll. 15-22, CF, p. 888, p. 62, ll. 5-10, CF, p. 888, 63, ll. 15-24, CF, p. 888, p. 64, ll. 1-20; CF, p. 2201, ¶2 of Judge LaBuda's Order on Reconsideration (citing deposition p. 42, ll.15-22) the other citation to p. 60 was to a later deposition not presented to Judge Langer regarding the subject motions for summary judgment, but was available for Judge LaBuda.

[12] Ex. 2, Fix depo., CF, p. 881, p. 10, ll. 24-25, CF, p. 881, p. 11, ll. 1-25, CF, p. 881, p. 12, ll. 1-6; Ex. 7, R. Tran depo., CF, p. 926, p. 79, ll. 1-18, CF, p. 926, p. 80, ll. 11-22; Ex. 10, Ferrara depo., CF, p. 949, p. 35, ll. 16-25, CF, p. 949, p. 36, ll. 1-14; Ex. 12, Despard depo., CF, p. 973, p. 63, ll. 19-25, CF, p. 973, p. 64, 11. 1-10 (he was not trespassing).

[13] Ex. 2, Fix depo., CF, p. 887, p. 42, ll. 15-22, CF, p. 888, p. 62, ll. 5-10, CF, p. 888, 63, ll. 15-24, CF, p. 888, p. 64, ll. 1-20

[14] Ex. 8, Mejia depo., CF, p. 933, p. 34, ll. 1-12.

[15] Ex. 2, Fix depo., CF, p. 890, p. 74, ll. 3-8.

[16] Ex. 2, Fix depo., CF, p. 881, p. 10, ll. 10-21.

14. Peter Stimson knew Mejia prior to the party. Torres also knew Mejia for close to six to seven months prior to the party from an introduction from Fix when the trio went skateboarding and when Mejia was at the Moorhead house with Fix on another prior occasion. CF, p. 857, ¶14.[17]

15. Mejia and Fix had known each other for a long time, were best friends, skateboarded together, went to Northglenn High School together, and saw each other four to five times a week. CF, p. 857, ¶15.[18]

16. Torres and Fix were also good friends who frequently skateboarded with each other, graduated from the University of Colorado together, did homework together, and as a result, Fix frequently stayed at the Moorhead house for two to three days at a time. CF, p. 857, ¶16.[19]

17. On June 17, 2011, Mejia met Przekurat, age 21, Sieck, age 20, Jeffrey Despard, age 19, Jordy Lee, age 19, and Nehemia Wilczynski, age 19, at Jeffrey

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[17] Ex. 4, P. Stimson depo., CF, p. 903, p. 41, ll. 23 - p. 42, l. 25; Ex. 8, Mejia depo., CF, p. 927, p. 10, ll. 3-14, CF, p. 928, p. 14, ll. 16-25, CF, p. 928, p. 15, ll. 1-9.

[18] Ex. 8, Mejia depo., CF, p. 927, p. 11, ll. 4-12.

[19] Ex. 2, Fix depo., CF, p. 889, p. 70, ll. 12-25; Ex. 3, Torres depo., CF, p. 891, p. 10, ll. 7-16.

Despard's house in order to go to the party at the Moorhead house. This group is referred to as the "Sieck Group." CF, p. 857, ¶17.[20]

18. Lee and Sieck were the last to arrive at Despard's house and the Sieck Group of six left for the Moorhead house party within ten minutes thereafter. Sieck had not consumed alcohol at Despard's house prior to going to the subject party. The only alcohol Sieck consumed that night was alcohol made available for his consumption at the Moorhead house party, and Sieck was 100% sober prior to going to the party. CF, pp. 857-58, ¶18.[21]

19. The Sieck Group drove two cars and on the way to the Moorhead house party in Boulder stopped for gas. No alcohol was purchased or consumed. CF, p. 858, ¶19.[22]

20. Mejia knew Despard, Sieck, and Lee from Northglenn High School and, with the exception of Lee, Mejia knew the Sieck Group pretty well. CF, p. 858, ¶20.[23]

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[20] Ex. 9, Sieck depo., CF, p. 945, p. 4, ll. 13-14; Ex. 17, Lee depo. and Aff., CF, p. 1045, p. 8, ll. 7-8; Ex. 18, Wilczynski depo. and Aff., CF, p. 1049, p. 9, ll. 21-24.

[21] Ex. 8, Mejia depo., CF, p. 929, p. 19, ll. 10-25, CF, p. 929, p. 20, ll. 1-15, 23-25, CF, p. 930, p. 21, ll. 1-11, CF, p. 937, p. 86, ll. 9-25, CF, p. 937, p. 87, ll. 1-2, CF, p. 943, p. 129, ll. 21-25, CF, p. 943, p. 130, l. 1 - p. 131, ll. 14, 19-23, CF, p. 943, p. 132, l. 10 - p. 133, l. 16; Ex. 17, Lee depo. and Aff., CF, p. 1046, p. 43, ll. 8-18; Ex. 18, Wilczynski depo. and Aff., CF, p. 1051, p. 35, ll. 22-24.

[22] Ex. 8, Mejia depo., CF, p. 943, p. 129, ll. 8-11.

21. The Sieck Group entered the Moorhead house through the unlocked front door together, as a group, without obstruction from anyone, in any way, shape or form. CF, p. 858, ¶21.[24]

22. The Sieck Group entered the Moorhead house led by Mejia. When the Group got to the kitchen area, they saw and spoke with Defendant Torres. Torres did not voice any objection, but did say at one point to Mejia, "I really don't know these other people, but I know you." The Sieck Group was present as Mejia vouched for them in front of Torres and got his consent, so the Sieck Group stayed at the party from approximately 10:00 p.m. to 2:00 a.m., without question or incident. CF, p. 858, ¶22.[25]

23. As a habit, Mejia thinks that he would have introduced himself to the host(s) of the party and believes that he introduced himself to co-host Defendants Samuel Stimson and Peter Stimson. CF, p. 858, ¶23.[26]

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[23] Ex. 8, Mejia depo., CF, p. 934, p. 38, ll. 17-25, CF, p. 934, p. 39, ll. 1-19, CF, p. 934, p. 40, ll. 10-25, CF, p. 935, p. 41, ll. 1-2.

[24] Ex. 8, Mejia depo., CF, p. 930, p. 21, ll. 12-25, CF, p. 930, p. 22, ll. 1-22, CF, p. 940, p. 120, ll. 6-25.

[25] Ex. 8, Mejia depo., CF, p. 940, p. 120, ll. 6-25, CF, p. 941, p. 121, ll. 1-25, CF, p. 941, p. 122, ll. 7-25, CF, p. 941, p. 123, l. 1 - p. 124, l. 4

[26] Ex. 8, Mejia depo., CF, p. 931, p. 26, ll. 14-18, CF, p. 939, p. 114, ll. 23-25, CF, p. 939, p. 115, ll. 1-2, CF, p. 941, p. 124, ll. 20-23, CF, p. 942, p. 125, ll. 11-15.

24. Mejia personally saw Sieck drinking beer from a red Solo cup while at the party and estimates Sieck drank six to nine beers and shots at the party. CF, p. 858-59, ¶24.[27]

25. Fix invited Roger Tran to the party, who went to the party with Andrew Flora. Tran and Flora had been friends since middle school and Flora was the same age as Tran, both being age 19 on the date of the party. Tran and Flora consumed alcohol at the party and on the Moorhead premises. CF, p. 859, ¶25.[28]

26. Tran and Lee personally observed Sieck drinking beer out of a red or blue Solo cup at the party. CF, p. 859, ¶26.[29]

27. Torres, Davis, and Peter Stimson all knew on June 17-18, 2011 that Defendant Samuel Stimson (their housemate and Peter's brother) was under the age of 21 and would be attending the party. CF, p. 859, ¶27.[30]

28. Samuel Stimson invited Steven Maury, who was also under the age of 21, to the party, and both Samuel Stimson and Maury were provided with and

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[27] Ex. 8, Mejia depo., CF, p. 932, p. 29, ll. 21-25, CF, p. 932, p. 30, ll. 1-22, CF, p. 938, p. 95, ll. 22-25, CF, p. 938, p. 96, ll. 1-5, CF, p. 943, p. 131, ll. 19-23.

[28] Ex. 7, R. Tran depo., CF, p. 915, p. 7, l. 17 - p. 8, l. 2, CF, p. 919, p. 21, ll. 5-25, p. 22, l. 1.

[29] Ex. 7, R. Tran depo., CF, p. 923, p. 68, ll. 22-23.

[30] Ex. 3, Torres depo., CF, p. 896, p. 31, ll. 1-20; Ex. 4, P. Stimson depo., CF, p. 902, p. 30, ll. 14-18; Ex. 14, Davis depo., CF, p. 1038, p. 36, ll. 8-9.

consumed alcohol on the Moorhead premises. CF, p. 859, ¶28.[31] They consumed Samuel's marijuana as well. *Id.*

29. The Defendants did nothing to detect whether party attendees were under the age of 21 and consuming alcohol on the premises. Defendants did not check IDs. They did not act as bouncers at the front door or at the gate in the fence to the premises. They did not secure, police, or "man" the kegs or Solo cups provided to consume the beer. Defendants failed to inquire as to the age of any party attendee. Defendants did not "kick anyone out" of the party. They did not call the police for any reason on June 17-18, 2011. CF, p. 859, ¶29.[32]

30. A friend of Davis, Mario Ferrara, was a freelance photographer and took 20 photographs at the party. CF, p. 860, ¶30.[33] Some photographs depict party revelers that appear intoxicated and "partying". *See generally* CF, pp. 950-69 and (20 photos are attached as **Appendix 2** depicting party revelers CF, pp. 1941-1960). Three photographs depict bottles of what appear to be hard alcohol. *See* CF, pp. 955, 959, 968.

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[31] Ex. 6, S. Stimson depo., CF, p. 911, p. 22, ll. 9-25, CF, p. 911, p. 24, ll. 4-6, CF, p. 913, p. 45, ll. 9-16.

[32] Ex. 3, Torres depo., CF, p. 893, p. 19, ll. 8-13, CF, p. 894, p. 24, ll. 4-10, 18-22-25, CF, p. 895, p. 25, ll. 1-6, 11-25, CF, p. 895, p. 26, l. 1 - p. 27, l. 20; Ex. 4, P. Stimson depo., CF, p. 899, p. 21, l. 10 – p. 22, l. 7, CF, p. 900, p. 25, ll. 1-20, CF, p. 902, p. 30, ll. 4-13; Ex. 6, S. Stimson depo., CF, p. 912, p. 26, l. 22 – p. 28, l. 21; Ex. 14, Davis depo., CF, p. 1036, p. 25, ll. 10-23, 19-25, CF, p. 1037, p. 29, ll. 12-15, CF, p. 1037, p. 30, ll. 1-11, 17-19, 24-25, CF, p. 1037, p. 31, 11. 4-11.

[33] Ex. 10, Ferrara depo., CF, p. 947, p. 14, l. 2 – p. 15, l. 3.

31. A lot of people knew Sieck and Mejia at the party and Mejia stated he had a lot of friends at the party. CF, p. 860, ¶31.[34]

32. There were at least 16 party attendees who were under the age of 21 who were provided alcohol at the party. The underage party attendees who were provided alcohol and consumed it on the Moorhead premises included: Samuel Stimson, Steven Maury, Victor Mejia, Hank Sieck, Nehemiah Wilczynski, Jordy Lee, Jeffrey Despard, Nancy Tran, Carin Doyle, Ashley Baca, Erik Kinney, Andrew Flora, Willie Raidle, Nate Turely, Luis Sanchez, and Roger Tran. CF, p. 860, ¶32.[35]

b. The motor vehicle crash.

33. Mejia, Sieck, and Przekurat left the Moorhead house at approximately 2:00 a.m. with Sieck driving Przekurat's vehicle. Przekurat was a passenger in the front seat of the vehicle. CF, p. 860, ¶33.[36]

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[34] Ex. 8, Mejia depo., CF, p. 935, p. 41, ll. 10-20. Ex. 13, PD Case Report, CF, p. 1007, p. 34; Ex. 18, Wilczynski depo. and Aff., CF, p. 1050, p. 29, ll. 9-19.

[35] Ex. 4, P. Stimson depo., CF, p. 904, p. 45, ll. 2-10; Ex. 6, S. Stimson depo., CF, p. 912, p. 25, ll. 12-25; Ex. 7, R. Tran depo., CF, p. 914, p. 4, ll. 18-19, CF, p. 922, p. 43, ll. 5-12; Ex. 8, Mejia depo, CF, p. 936, p. 61, ll. 3-8; Ex. 13, PD Case Report, CF, pp. 975-76, 978, pp. 2, 3, 5; Ex. 15, N. Tran depo., CF, p. 1039, p. 6, ll. 9-10; Ex. 16, Doyle depo., CF, p. 1041, p. 5, ll. 7-8; Ex. 19, Colorado Motor Vehicle Records, CF, pp. 1052-62.

[36] Ex. 13, PD Case Report, CF, pp. 1006-07, pp. 33-34.

34. At about 2:12 a.m., Sieck was driving eastbound on Highway 36 approaching Wadsworth Boulevard driving at speed in excess of 100 mph. Sieck failed to negotiate a curve, lost control, ran off the right side of the road colliding with an embankment, and rolled several times ejecting Przekurat. CF, p. 861, ¶34.[37]

35. Sieck's blood alcohol content on June 18, 2011, at 3:52 a.m. was 0.129, his draw at 4:52 a.m. was at 0.103, and his draw at 5:52 a.m. was 0.09. CF, p. 861, ¶35.[38]

c. Przekurat's arguments in the district court.

Przekurat argued that the Dram Shop Act was amended in 2005, by House Bill 05-1183, to proscribe the precise conduct of the Defendants. The Bill was introduced by Representative Angie Paccione. CF, pp. 864-65.

Przekurat asserted that since 2005, Social Host liability no longer requires specific and actual knowledge of a particular minor when a party is hosted at a venue that is wide open for underage guests to drink on the premises. CF, pp. 868-71.

Later, on December 18, 2013, Przekurat submitted transcripts of some Legislative Hearings (CF, pp. 1218-26) as part of his Response (CF, pp. 1206-37)

[37] Ex. 13, PD Case Report, CF, pp. 974-1033.

[38] Ex. 13, PD Report, pp. 19 (CF, p. 992), 31 (CF, p. 1004), 44 (CF, p. 1017), and lab results.

to "Samuel Stimson's Supplement … Regarding Senate Bill 86 and House Bill 1183" (CF, pp. 1169-73).

3. Summary judgment was granted to the Moorhead Defendants.

The district court, Judge Bruce Langer, granted the Defendants summary judgment on February 5, 2014. The Court concluded that "actual knowledge" of the individual, the individual's age, and the individual's attendance was required. *See* CF, pp. 1278-79. The court concluded that Defendants did not have "actual knowledge as required by §12-47-801(4)(a)(I)". CF, p. 1279.

4. Przekurat's motion to reconsider Defendants' summary judgments.

One day before Fix was dismissed, on June 15, 2015, CF, p. 2592, Przekurat filed his Motion to Amend and for Further Consideration of the Court's Previous Order Granting the Moorhead Defendants Summary Judgment Based Upon Error of Law, and some new evidence that Przekurat proffered to resist Fix's motion for summary judgment that was the founded on the same arguments as the Defendants. CF, pp. 2568-85. Przekurat sought relief under C.R.C.P. 59. CF, p. 2569.[39]

[39] In reinstating Przekurat's claims as to Fix, the district court relied upon new evidence—the deposition of Ms. Uzeta obtained by Przekurat on September 4, 2014, after the Defendants prevailed on their summary judgment motions granted on February 5, 2014. The district court reinstated Przekurat's claim against Fix, in part, because Ms. Uzeta testified that the party late that night at times was as small as 10-20 people and so an issue existed whether Fix knew and encountered Sieck at the party. Order Granting Motion to Alter/Amendment Judgment, CF, p. 2259

On August 17, 2015, the district court denied Przekurat's Motion to Amend and for Further Consideration solely on jurisdictional grounds. CF, pp. 2755-59. That jurisdictional ruling was reversed by the court of appeals, but it denied a remand.

III. SUMMARY

In 2005, the scope of a social host's liability—as opposed to liquor licensee's liability—was broadened beyond the then existing bounds of liability and the standard of culpability was reduced from "willfully and knowingly" to merely "knowingly".

Instead of limiting liability to the control and provision of alcohol to a minor, liability was expanded to impose liability for providing "a place" for underage drinking to remedy the liability "loophole" created by *Forrest*.[40] *See* H.B. 05-1183. CF, pp. 1071-76.

(third full para.); Motion to Alter/Amendment Judgment and Reconsider CF, p. 2209, at ¶8.

Accordingly, the slip opinion, at ¶¶15-16, stating there was no new or additional evidence upon which to base a remand is misplaced. A remand is appropriate because of the reversal of the district court's jurisdictional error and the party was as small as 10 people and no bigger than 20 that night according to Ms. Uzeta and an *inference* exists that the Defendants encountered Sieck.

[40] "[W]e hold that the statutory requirement of willfully and knowingly serving is met only when a social host has control over or takes an active part in supplying a minor with alcohol, and that providing a home at which alcohol is consumed by minors, without more, does not create liability under our statutes." *Forrest v. Lorrigan*, 833 P.2d 873, 875 (Colo.App. 1992).

The standard of conduct triggering social host liability under the Act was reduced from "willfully and knowingly" serving alcohol to an underage guest, to include a new provision making social hosts liable for knowingly provid[ing] "a place" for underage drinking. H.B. 05-1183. The Act as amended, however, did not make any change to the corresponding liquor licensee provision. As such, the 2005 amendment must be construed together as written, as intended, and as supported by the legislative history to further its newly crafted remedial purpose to abate underage drinking by imposing liability upon social hosts who provide venues open to underage drinkers.

IV. ARGUMENT.

A. Standard of review and preservation of the issue in the record.

Summary judgments are reviewed *de novo*. *McIntyre v. Bd. of County Commrs.*, 86 P.3d 402 (Colo. 2004). "Statutory interpretation presents a question of law that we review de novo." *In re R.C.*, 309 P.3d 954, 956 (Colo.App. 2013). The issues were preserved throughout Przekurat's Combined Response, CF, pp. 853-1078, as detailed above, and in his Motion to Amend and for Further Reconsideration, CF, pp. 2568-85.

B. The courts below eviscerated the duty imposed by the 2005 amendments.

House Bill 05-1183 was enacted to abate the loss of life caused by underage drinking as evidenced in its declarations and the expansion of social host liability. The declarations provide:

> **SECTION 1. Legislative declaration.** (1) The general assembly finds and declares that:
>
> (a) The incidents of death related to underage binge drinking have come to the forefront of the concerns of the state of Colorado; and
>
> (b) Colorado has a strong interest in preventing further deaths as a result of underage binge drinking.

The amendments were aimed to protect underage college-age men and women in several respects and explicitly by foreclosing anyone from providing a party venue open for underage drinking. *See id.*

Representative Paccione testified that she brought H.B. 05-1183 to the legislature because of the "recent deaths from alcohol poisoning" including that of Sam Spady, Gordie Bailey, Amanda Morrison, Jason Bannick, and Joseph Michael Osborn all of whom were college students. CF, p. 1218.

The duty prescribed is clear: Do not knowingly provide a place for underage social guests to drink. To construe the new venue-based liability provision as the courts below did effectively negates the duty created by H.B. 05-1183. Conditioning liability upon a social host's actual, specific, and subjective knowledge that a *particular* guest is in attendance and underage guts the 2005 amendments, their purpose, and the duty not provide an under-age drinking venue.

By adopting such a construction, the courts below allowed the Defendants, as social hosts, to throw a wide-open "kegger" with impunity—despite providing their home as a party venue where 16 underage guests entered freely and drank indiscriminately.

1. The courts below read "knowingly" in isolation ignoring the amendments overall, their purpose, and the duty they create.

In 2005, the scope of a social host's liability was broadened beyond the existing bounds by: (a) imposing a new duty, and (b) lowering the standard of culpability. These changes were not given effect by the courts below. "A legislative amendment either clarifies or changes existing law, and we presume that by amending the law the legislature has intended to change it." *City of Colo. Springs v. Powell*, 156 P.3d 461, 465 (Colo. 2007).

Instead of limiting liability to the active service of alcohol to a minor, liability was expanded to impose liability for "provid[ing] a place" for underage drinking. H.B. 05-1183 was intended to close the "loophole" created by the holding in *Forrest*. CF, pp. 1071-76.

The 2005 amendments should be construed broadly to give effect to their remedial purpose. *See Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992). Moreover, waivers to statutory immunity are construed broadly to

effectuate their intended goals. *Springer v. City & County of Denver*, 13 P.3d 794, 803 (Colo. 2000).

The standard of culpability triggering social host liability under the Act was reduced. House Bill 05-1183 deleted the word "willfully" to lower the applicable standard and "knowingly" must now be read in harmony with that deletion, the statutory declaration, and the legislative history to further the purpose to abate underage drinking—by precluding social hosts from providing "a place" for such alcohol consumption.

The court of appeals' reliance on *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo.App. 1994) is misplaced. *Dickman* construed the joint term "willfully and knowingly" in the differing context of a liquor licensee's liability, and the case focused on actual service to an underage patron—not the subsequent 2005 amendments foreclosing social hosts from opening a party venue to underage guests. The 2005 amendments did not alter the liquor licensee provision or reduce that standard from "willfully and knowingly" to just "knowingly." The same is true regarding court of appeals' reliance on *Build It and they Will Drink It, Inc., v. Strauch*, 253 P.3d 302 (Colo. 2011).

While H.B. 05-1183 still used the word "knowingly," such conduct relates to provision of the venue—not the specific name, age, or presence of the underage guest. There need not be any control over the service of alcohol to a minor as the

court of appeals held in *Forrest*. Closure of the "loophole" created by *Forrest* is why H.B. 05-1183 was enacted, as discussed more below regarding the legislative testimony that is compelling.

The court of appeals' extensive reliance upon *Dickman* and *Build It & They Will Drink* is misplaced because the 2005 amendments control. House Bill 05-1183's declaration, plain text creating venue liability, deletion of the word "willfully," taken with the obvious intent of such text and the unified legislative voices testifying that they must close the *Forrest* "loophole" control over *Dickman* and *Build It & They Will Drink*.

The court of appeals' conclusion that the legislature needed to overrule *Dickman* in order to expand social host liability is misplaced.[41] The legislature need not explicitly overrule or even address *Dickman*, because the case pertains to a different statutory provision regarding a different subject set forth in a different context. The text of the 2005 amendments controls and explicitly created an all-new duty for social hosts not to provide "a place" for underage drinking.

The General Assembly clearly articulated a new public policy and imposed a new duty to foreclose social hosts from providing "a place" or venue open for underage drinking, which the court of appeals did not appreciate at any level. The

[41]The court of appeals concluded that the General Assembly was aware of the *Dickman* case and implicitly approved it because the legislature did not intend to "overrule" it. Slip op. at ¶23. That conclusion is misplaced given the court's failure to even address *Forrest*.

General Assembly also sought to close the "loophole" created by *Forrest* as evidenced both by the addition of the *text* creating liability for providing "a place" for underage drinking and as articulated in the legislative hearings discussed below.

Under the 2005 amendments, social host liability now can be solely "venue-based" upon knowingly providing a place to underage guests to drink indiscriminately, which is exactly what the Defendants did in this case. The evidence is undisputed and proves their liability as a matter of law.

The Defendants cannot obviate the duty imposed by H.B. 05-1183 by their abject and wholesale breach of the duty. Self-induced ignorance is no defense and cannot limit the scope of the duty intended and imposed by the 2005 Amendments. Similarly, although using slightly different terminology, "willful ignorance" is not a defense either.[42] Although certiorari was not granted on that issue, it is subsumed

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[42] *See Denver, S.P. & P.R. Co. v. Conway*, 8 Colo. 1, 9, 5 P. 142, 147 (1884) ("willful ignorance of a fact is equivalent to actual knowledge of that fact"); *Mackey v. Fullerton*, 4 P. 1198, 1200 (Colo. 1884) ("A man who abstains from inquiry when an inquiry ought to be made, cannot be heard to say no, and rely upon his ignorance").

As to a holder in due course, bad faith includes "willful ignorance." *George v. Metro Fixtures Contractors, Inc.*, 178 P.3d 1209, 1215-16 (Colo. 2008) "Certainly, prosecutors cannot bury their heads in the sand and prevent prisoners from invoking their UMDDA rights through willful ignorance." *People v. McKimmy*, 2014 CO 76, ¶36. In *Powder Mtn. Painting v. Paragon Jt. Venture*, 899 P.2d 279, 281 (Colo.App. 1994), "willful ignorance" can be "the equivalent to chargeable actual knowledge." *Id*. at 281 (citing *Mackey v. Fullerton*, 7 Colo. 556, 4 P. 1198, (1884)).

herein, and it was briefed below as "self-induced ignorance."[43] *See, e.g.*, Opening Brief at 32-33.

The slip opinion describes Defendants' self-induced or willful ignorance:

> - Alcohol was freely available at this party.
> - Access to the party was unrestricted.
>
> . . .
>
> - The hosts did not ask party attendees their age or take any other steps to ensure that underage drinking would not take place at the party.

Slip op. at ¶34.

Defendants, however, did not merely "look the other way," they knowingly planned and opened their house as a party venue and indiscriminately provided alcohol—knowing anyone of any age could and would attend the "kegger." Defendants also knew Samuel Stimson was cotenant and an underage co-host of the party, and Samuel invited his own underage guest. The Defendants' conduct includes both a host of commissions and omissions.

2. Social host liability no longer is solely "service-based" requiring service to a specific individual as *Forrest* held.

House Bill 05-1183 provides as follows:

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[43] *See* Przekurat's Response to Torres' Motion to Dismiss/SJ: CF, pp. 195-96; Przekurat's Combined Response opposing Defendants' Motions for Summary Judgment: CF, pp. 871-72; and his Replies supporting his Motion for Reconsideration: CF, pp.2614-16, 22; CF, pp. 2636-40, 46; CF, pp. 2674-76, 83; and the proposed order: CF, pp. 2764-66.

> **12-47-801. Civil liability – legislative declaration.** (4)(a) No social host who furnishes any alcohol beverage is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered, including any action for wrongful death, because of the intoxication of any person due to the consumption of such alcohol beverages, except when:
>
> (I) It is proven that the social host ~~willfully and~~ knowingly served any alcohol beverage to such person who was under the age of twenty-one years OR KNOWINGLY PROVIDED THE PERSON UNDER THE AGE OF TWENTY-ONE A PLACE TO CONSUME AN ALCOHOLIC BEVERAGE . . . (underlining added).

Paragraph 4(a) speaks in terms of the "intoxication of any person" and the first waiver of immunity in subparagraph 4(a)(I) relates to the *service* of alcohol to "such person" meaning "any [intoxicated] person" who is under the age of 21 years.[44] *See id.* (emphasis added). Any is a nonspecific pronoun.

However, the alternate, *venue-based* waiver of immunity relates to "knowingly provid[ing] the person" meaning and referring to the phrase above: "any such [intoxicated] person" under the age of twenty-one a place to consume alcoholic beverage." *See id.* (emphasis added).

[44] The issue whether the *service-based* social host liability provision as amended in 2005 requires actual, specific, and subjective knowledge that the social guest served was underage has not been ruled upon by any Colorado appellate court. However, it would make little sense to confer immunity upon social hosts who blindly provide alcohol to unknown persons and make no inquiry of their age. Such conduct, however, involves control over the service or provision of alcohol, while the venue-based liability provision does not.

Knowingly modifies what is provided meaning "a place" or the venue—not the age of the person. If actual knowledge of age were required, then the venue-provision would not expand social host liability as the General Assembly intended. The legislative hearings detailed below show that even where a person may provide a "vacant building" used for underage drinking would constitute a breach of the duty.

Actual knowledge of the underage person is not required given the duty prescribed by the text, purpose, and operation of the 2005 amendments as well as the facts presented here.[45] The Defendants' party venue was opened to anyone of any age and beer and hard liquor were provided indiscriminately to any social guest without limitation.

3. The court of appeals' construction leads to absurd results.

The construction by the courts below imposes virtually a non-existent duty. The courts below circumscribed the duty imposed by H.B. 05-1183 by the actual and subjective knowledge of the Defendants, and thereby negated the duty imposed by the 2005 amendments. Such a construction is not reasonable.

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[45] "Constructive knowledge may be inferred if the conduct occurs openly, such that a reasonable person would observe it. If knowledge of the prohibited conduct could have been obtained through the exercise of reasonable care and diligence, constructive knowledge may be inferred." *Full Moon Saloon, Inc. v. City of Loveland*, 111 P.3d 568, 570 (Colo.App. 2005). CF, p. 871, ¶5. However, the court of appeals choose to distinguish that case.

A social host need only exclude an underage guest when a social host actually knows that specific guest is in fact underage. That imposes no duty to limit entry to the venue by anyone unknown to the social hosts even where, as here, the hosts throw a wide-open "kegger" allowing unknown guests to enter their venue freely and drink indiscriminately.

By way of example, under such a narrow construction, a parent could host a piñata birthday party for their young child in their sandbox outside and in their unfenced yard. The parents, as social hosts, could put out Margaritas in Dixie cups, go back inside their home, and allow unknown neighbor children who were invited by the parent's own children, or even just happen to hear of the party, enter the premises and help themselves to the Margaritas. Thereafter, the hosting parents could claim immunity because the parents did not "invite" the neighborhood children and the hosting parents did not possess "actual knowledge" of a particular underage guests' identity, age, or attendance at the party.

Defendants successfully asserted such a defense here arguing: We did not "invite those guys," including Sieck, but they showed up, and we did not know their names, ages, or even if they were present at the party—despite the fact Sieck was in attendance for about four hours and the size of the party ranged from large

to small and the number of guests was 20-30 (and later acquired evidence indicated the party later that night was a small as 10-20 guests[46]).

Defendants denied "that a social host has a duty to know all the people and ages of all the people at a party. There is no legal duty to do so in Colorado." CF, p. 758. The 2005 amendments, however, cannot be so construed if their remedial purpose is given full effect.

4. The courts below refused to consider the history of the 2005 amendments.

"Our primary task is to give effect to the intent of the General Assembly. This intent will prevail over a literal interpretation of the statute that would lead to an absurd result." *Henisse v. First Transit, Inc.*, 247 P.3d 577, 579 (Colo. 2011) (internal citation omitted).

"[S]tatutory interpretation is driven first and foremost by legislative intent and it is our goal to effect that intent. In doing so, we look first to the language of the statute. If intent can be ascertained from the statutory language, we need delve no further." *Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187, 1192 (Colo. 1996).

However, "[t]hese time-honored canons of statutory interpretation, however, are tempered by the constraint that we should avoid a statutory construction which

[46] That circumstantial evidence alone is enough to create a disputed issue as Judge Labuda concluded regarding Fix's motion for summary judgment irrespective of how the statute was construed. CF, pp. 2259-61. However, the court of appeals rejected such a favorable inference despite its de novo review, which constitutes error. *See* slip op. at ¶¶58-60.

leads to an absurd result." *Id*. "Therefore, although the plain language [may support a party's] proffered construction, we must inquire further of the legislative intent." *Id*. "We will not adopt a construction that leads to an absurd result." *Leonard v. McMorris*, 63 P.3d 323, 326 (Colo. 2003). There is no absolute rule to ignore legislative testimony when it is helpful to discern legislative intent whether the plain language is ambiguous or not. *See id.* The court of appeals' refusal to consider the legislative testimony is misplaced given the text of the 2005 amendments and deletion of the word "willfully".

Here, both the court of appeals and the district court imposed a strained construction upon the 2005 amendments frustrating their remedial purpose and violating their plain text. In any event, the text is ambiguous.

5. "Knowingly" is ambiguous.

The courts below found the term "knowingly" was clear and unambiguous, and they refused to consider any legislative history. CF, pp. 1275-80; slip op. at ¶25, n.4, ¶¶26-27. Nevertheless, the district court turned to the Colorado Consumer Protection Act[47] to find a case construing the term to require "actual knowledge." Reaching to an entirely different statutory scheme that is based on

[47] In the CCPA, "knowingly" is used in a different context regarding statutory fraud, which requires intentional conduct as set forth by C.R.S. §6-1-105(1). *See State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 14-15 (Colo. App. 2009).

intentional conduct reveals that "knowingly" is not clear or unambiguous as used in the Dram Shop Act, especially when the 2005 amendments also deleted the word "willfully."

"Knowingly" is susceptible to different interpretations as evidenced by the fact that both Defendants and Przekurat presented legislative history[48] to the trial court. Peter Stimson and the other Defendants admitted he "found no direct Colorado authority that construes the term 'knowingly' as applied to a social host liability under the statute." CF, p. 765.

The court of appeals also noted that the word "knowingly" is "not defined by the Dram Shop Act" (slip op. at ¶18). However, the court held it was unambiguous (slip op. at ¶¶25-26) despite:

1) the plain text and declaration of H.B. 05-1183;

2) the fact that the amendments deleted the word "willfully" from the social host liability provisions; and

3) the fact that the *venue-based* social host liability provision roots liability in providing "a place" to drink as opposed the *service-based* social host provision roots liability in controlling the service or provision of alcohol to underage guests.

The 2005 amendments rendered "knowingly" susceptible to different interpretations. And even if the term were unambiguous, the legislative history can

[48] Przekurat's submission of the testimony is set forth in **Appendix 4**.

and should be considered to avoid reaching an unreasonable or absurd construction. *See Leonard*, 63 P.3d at 326.

6. The legislative testimony from numerous witnesses supports Przekurat's construction of the Act, which gives dignity to the duty created by H.B. 05-1183.

In the district court, Przekurat noted that legislative intent will prevail over a literal interpretation of a statute that leads to an absurd result. *AviComm, Inc. v. Colo. Pub. Util. Commn.*, 955 P.2d 1023, 1031 (Colo. 1998). CF, p. 866. The construction of H.B. 05-1183 imposed below negates the General Assembly's intent.

Representative Paccione testified that "[w]e do have a problem, an alcohol problem. And that we have a bigger problem on those people that are providing the alcohol to minors. . . . Especially those adults who are providing the place and the beer. . . ."[49] CF, p. 1219. Her testimony focused on the provision of "a space or a place" for minors to consume:

> It would create a civil liability for those who provide a place for minors to consume alcohol, not just in the home or but it could also be if you are having a bonfire or if you are going through an abandoned building and you are providing a space and a place for minors to consume, you could be sued.

CF, p. 1219 (emphasis added).

[49] Although the court of appeals rejected her personal affidavit, the record shows she also testified in the hearings on H.B. 05-1183 as did others.

Representative Paccione noted that the bill "closes a loophole." CF, p. 1208 (transcript at CF, p. 1220).

Michael Dohr from the Office of Legislative Legal Services testified that the narrow construction of the service-based liability provision should be remedied:

> [T]hat statute has been interpreted very narrowly by the courts and so there have cases where there have situations where there have been parties at the home and they haven't actually been able to show that the, the person whose home it was actually provided the alcohol. . . . So that's what this Amendment would address is those situations where it has been interpreted very narrowly courts and to also ensure that there is some liability in those cases.

CF, p. 1221 (emphasis added).

Shayne Madison testified as a representative from Anheuser Busch about the "pivotal" *Forrest* case:

> And, what our courts said basically is that unless physical possession came from me to you I had actual possession of the can of whatever and I gave it to you and you took it from me. Unless we had proof that rose to that level that there was no civil liability. And there was a case in 1992 that was fairly pivotal, *Forest* [sic] *v. Lorigan* [sic], and I have a copy of that case I can get up to you guys. But, in that case mother knowingly allowed her home to be used by her minor daughter for a party with alcohol present. The mother actually went out and helped the daughter collect the money to buy the alcohol and was sort of the gatekeeper when the kids came in but because they couldn't prove she physically had possession of a glass and gave it to the minor, there was no civil liability.

CF, p. 1222 (emphasis added).

Representative Carroll testified about Colorado's public policy: "But I think the matter of public policy, I know one of the things that we want to do is keep our kids off the road when they have had something to drink and we don't want to harbor a home for them to have a place to drink. . . ." CF, p. 1223.

Representative Paccione also testified about the *Forrest* fact pattern: "there was a loop hole that allowed a, an adult to host the party and not get charged with distributing to minors unless the police were able to prove that they actually physically handed a minor a drink. . . ." CF, p. 1211, ¶8 (transcript at CF, p. 1224). "[S]o we closed that loop hole by saying that if you provide the place for minors to consume alcohol that you would be liable by civil law." *Id*.

Senator Grossman testified about the fact pattern presented here: "Again, it ah creates a civil liability for somebody who is, for example is of age and has a party at their house and provides the beverages to minors for example by having a keg there but doesn't physically hand the beverage to the minors so that changes that." CF, p. 1225.

The legislative history shows that the purpose of the new venue-based liability provision is intended to prohibit a host from knowingly providing "a place" for minors to drink and close the *Forrest* loophole. That provision, however, cannot be given effect where a venue is thrown open to underage guests

and alcohol is freely provided, but liability is conditioned upon the social host's actual or subjective knowledge of a *particular* guest's age.

V. The Defendants must be held accountable for their wholesale and deliberate breach of their duty not to provide a venue open for underage drinking.

The Defendants argued they had no duty to "police [the] party by asking individuals for identification or controlling access to the party." CF, p. 759. Likewise, they argued that for "a social host there is *no duty* to undertake efforts to determine *if people in your home are of legal drinking age*." CF, p. 759 (emphasis added). Defendants ignore the duty that the 2005 amendments imposed upon them and the amendments' purpose to close the "loophole" created by *Forrest*.

Social hosts, like the Defendants, must be held accountable for knowingly providing of a venue that is wide open for underage guests to drink indiscriminately. The duty is clear: Do not knowingly provide a place for underage social guests to drink. "Knowingly" means a social host providing an open venue and openly available alcohol must now inquire and screen those who enter their party-venue to drink or face liability. "Self-induced ignorance" does not afford immunity any longer. *Compare Forrest with* H.B. 05-1183.

The Defendants cannot obviate their duty by their wholesale violation of the very duty imposed by the 2005 amendments. Accordingly, the summary

judgments affirmed by the court of appeals should be vacated and the case remanded.

However, if the duty imposed by H.B. 05-1183 is given full effect as Przekurat contends and that duty is considered in light of the undisputed record regarding the Defendants' conduct, no issue remains for trial as to the liability of the Defendants. This Court may conclude as a matter of law, on the undisputed record, that no genuine issue of material fact exists that Defendants' breached the duty imposed by H.B. 05-1183. *See Geiger v. Am. Standard Ins. Co. of Wis.*, 192 P.3d 480, 484-85 (Colo.App. 2008) (citing *Pueblo of Santa Ana v. Mt. States Tel. & Tel. Co.*, 734 F.2d 1402, 1408 (10th Cir. 1984)).

WHEREFORE, Petitioner respectfully requests that the judgment of the district court and court of appeals be vacated and that the case be remanded for a trial on the merits limited to the issue of damages or as the Court may direct based on its disposition of the merits of its review.

RESPECTFULLY SUBMITTED this 24th day of October 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on this 27th day of October 2017, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was filed with this Court and served to the following via ICCES:

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Pursuant to C.A.R. 30(f), this document with original signatures will be maintained by the filing party and made available for inspection by other parties or the Court upon request.

APPENDICES

Appendix 1 Dram Shop Act amended by H.B. 05-1183

Appendix 2 Photographs of "kegger" party

Appendix 3 Photograph and a letter describing Przekurat's injuries from Craig Rehabilitation Hospital

Appendix 4 Legislative testimony