DATE FILED: January 5, 2018 10:07 AM
FILING ID: A7265E8710677
CASE NUMBER: 2017SC15

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Reviewing decision issued on December 1, 2016, by Division VII of the Colorado Court of Appeals, in Case No. 2015CA1327
(Opinion by Judge Berger;
Terry and Booras, JJ., concur)

Appeal from the District Court, County of Boulder, State of Colorado
Case Number: 2012CV540
The Honorable Judith L. LaBuda

▲ **COURT USE ONLY** ▲

Petitioner:
JARED J. PRZEKURAT, by and through his Parent, Co-Guardian, Co-Conservator and Next Friend, Jerome Przekurat

Respondents:
SAMUEL S. STIMSON, MITCHELL DAVIS, CHRISTOPHER TORRES, PETER STIMSON

Case Number: 2017SC15

Attorneys for Respondent Christopher Torres:
Name: Alan Epstein #10473
Address: Hall & Evans, L.L.C.
1001 Seventeenth Street, Suite 300
Denver, Colorado 80202
Phone No.: 303-628-3300
Fax No.: 303-628-3368
E-Mail: epsteina@hallevans.com

Name:	Thomas E. Hames, #13743	
Address:	Ray Lego & Associates 6060 S. Willow Dr., Suite 100 Greenwood Village, CO 80111	
Phone No.:	720-963-7000	
Fax No.:	720-963-7001	
E-Mail:	thames@spt.com	

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, 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) or C.A.R. 28.1(g).

_X_ It contains 4,874 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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 to an entire document.

_X_ **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 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 or 28.1, and C.A.R. 32.

s/Alan Epstein
Signature of attorney or party

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

I. ISSUE PRESENTED

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 and Disposition Below

Plaintiff, Jared Przekurat, brought this action under §12-47-801(4)(a)(I), C.R.S. against defendants, Christopher Torres, Samuel Stimson, Peter Stimson[1], and Mitchell Davis. (R. CF, pp. 70-75) Plaintiff alleged that on June 18, 2011, defendants Torres, Davis, and the Stimson brothers were college students residing at 3505 Moorhead Avenue, in Boulder, Colorado. Plaintiff alleged that on June 18, 2011, these defendants hosted a party at which party guests consumed alcohol. ***Id***.

Plaintiff alleged that he attended defendants' party with two friends, Hank Sieck and Victor Mejia. Plaintiff alleged that at approximately 2:12 a.m., plaintiff, Sieck, and Mejia left the party in plaintiff's car. Plaintiff alleged that Sieck drove plaintiff's car while plaintiff rode in the front passenger seat. ***Id***. Plaintiff alleged that Sieck drove eastbound on Colorado Highway 36 at a speed in excess of 100

[1] Samuel Stimson and Peter Stimson are brothers.

mph, failed to negotiate a curve in the road, ran off the right side of the roadway, and collided into an embankment on the west side of the ditch. ***Id***. at 72.

Plaintiff was ejected from the car and sustained bodily injury as the result of the one-car accident. ***Id***. Sieck was intoxicated at the time of the accident after consuming alcohol at the party.

Plaintiff subsequently filed a second amended complaint to include Robert Allen Fix as a party defendant. (R. CF, pp. 828-837) Plaintiff alleged that defendant Fix also provided alcohol to and/or provided a place for Sieck to consume alcohol. ***Id***. Plaintiff settled with Fix. (R. CF, pp. 2550-51) The trial court dismissed Fix as a party defendant. (R. CF, p. 2592)

Torres, Mitchell, and the Stimson brothers all moved for summary judgment. (Torres, CF, pp. 130-136; 368-376; 751-760; 844-45; 847; 850; Davis, CF, pp. 769-787; Peter Stimson, CF, pp. 410-412; 763-66; Samuel Stimson, R. CF, pp. 791-826)

The trial court granted defendants' motions for summary judgment. (R. CF, pp. 1275-79)

Just before Fix was dismissed as a party defendant, plaintiff moved to amend and for further consideration of the court's previous order granting the other defendants' summary judgment motions. (R. CF, pp. 2568-84) Plaintiff argued

that the district court judge who granted defendants' motions for summary judgment (The Honorable Bruce Langer) erred as a matter of law. ***Id***. Plaintiff's motion to amend and for further consideration reiterated the same legal arguments plaintiff had advanced in his original response to defendants' motions for summary judgment. ***Id***.

The district court (The Honorable Judith L. LaBuda presiding) denied plaintiff's motion. (R. CF, pp. 2755-59)

Plaintiff appealed. (R. CF, pp. 2709-2716; 2776-2781) The Court of Appeals affirmed. ***Przekurat v. Torres,*** 2016 COA 177.

Plaintiff petitioned for writ of certiorari. This Court granted in part and denied in part plaintiff's petition for writ of certiorari.

B. Statement of Facts

In June 2011, defendant Torres was residing in a house located at 3505 Moorhead Avenue in Boulder, Colorado. (Affidavit of Christopher Torres, R. CF, p. 135) Torres' roommates were Mitchell Davis and the Stimson brothers. ***Id***.

On June 18, 2011, Torres, Davis, and Peter Stimson had a party to celebrate Davis' 24th birthday and Torres' and Fix's graduation from the University of Colorado. (Fix deposition, R. CF p. 883) At this time, Torres, Davis, and Peter Stimson were all over the age of 21.

Torres did not know either plaintiff or Sieck.[2] (Torres affidavit, R. CF, p. 136) Torres did not invite either plaintiff or Sieck to the party, nor did Torres' roommates invite them to the party. ***Id***. The reason plaintiff, Sieck, and Mejia attended the party was because Mejia had heard about the party by word of mouth through Fix. (Fix deposition, R. CF, p. 928)

At the time of the party, plaintiff was 21 years old and Sieck was 20 years old. However, Torres did not know that Sieck was under 21 years of age. ***Id.*** Torres did not meet or interact with Sieck at the party. (Torres affidavit, R. CF, p. 136) Torres did not become aware that Sieck was 20 years old at the time of the party until the fall of 2012 when service of process was attempted on Torres. ***Id.*** Therefore, Torres did not serve alcohol or provide a place to consume alcohol to a person (Sieck) whom Torres knew to be under 21 years old.

---

[2] Plaintiff suggests there is a question of fact whether Torres knew Sieck and Sieck's age. Plaintiff bases this contention on the trial court's order granting plaintiff's motion for reconsideration of the court's previous order granting Fix's motion for summary judgment. (R. CF pp. 2257-61) Plaintiff contends the same rationale the court employed with respect to Fix's motion for reconsideration should have compelled the court to grant plaintiff's motion to reconsider the summary judgment orders entered in favor of the other defendants. This contention is without merit. The reason the trial court granted plaintiff's motion for reconsideration with respect to Fix's summary judgment motion was that plaintiff presented evidence from which a jury could infer that Fix knew Sieck, Fix knew Sieck was at the party, and Fix knew that Sieck was under 21 years of age. ***Id***. There is no such evidence in the record with respect to Torres.

Sieck consumed alcohol and became intoxicated at the party. Plaintiff, Sieck and Mejia left the party at approximately 2:10 a.m., with Sieck driving plaintiff's car and plaintiff riding as a passenger in the front seat of the car. Sieck drove at a speed in excess of 100 mph, lost control of the car, and collided with an embankment. Plaintiff was injured in the car accident.

III. SUMMARY OF ARGUMENT

Section 12-47-801(4)(a)(I), C.R.S. imposes liability on a social host only where the host knowingly serves alcohol to a person under 21 years of age or provides a place to consume alcohol to a person the host knows to be under 21 years of age. The language of §12-47-801(4)(a)(I), C.R.S. is unambiguous. H.B. 05-1183 was intended to broaden the liability of a social host from simply providing alcohol to a minor to include providing *a place* to a minor to consume alcohol. But H.B. 05-1183 did nothing to alter the requirement that the social host actually know that the person to whom he provides alcohol, or to whom he provides a place to consume alcohol is a minor.

Assuming the statute was ambiguous, the legislative history does not support plaintiff's interpretation that the social host need not have actual knowledge that the person to whom he provided a place to consume alcohol was under 21.

Therefore, the trial court properly entered summary judgment in Torres' favor since he did not know Sieck or know that Sieck was under 21 years old at the time of the party.

IV. ARGUMENT

The Court of Appeals Did Not Negate 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 by Requiring "Actual Knowledge" of a Specific Guest's Age.

Standard of Review: This Court reviews the granting of summary judgment *de novo*. ***Settle v. Basinger***, 2013 COA 18, ¶51.

Preservation for Appeal: Plaintiff preserved this issue for appeal.

* * *

Introduction

The Court of Appeals did not, by requiring actual knowledge of a specific guest's age, negate the duty §12-47-801(4)(a)(I), C.R.S. imposes upon social hosts not to provide "a place" for underage drinking. H.B. 05-1183 was enacted to expand a social host's liability from affirmatively furnishing alcohol to minors to also include providing a place for minors to consume alcoholic. But the plain legislative intent both before and after the enactment of H.B. 05-1183 was that the social host actually know the age of the person either to whom alcohol was provided, or to whom a place to consume alcohol was furnished. The Court of

Appeals no more negated the duty imposed by §12-47-801(4)(a)(I) on a social host than this Court negated the duty imposed on liquor licensees under §12-47-801(3)(a)(I) (2010) by holding that a liquor licensee have "*actual knowledge* of the patron's intoxicated state" (emphasis added) to impose liability on the licensee in ***Build It and They Will Drink v. Strauch***, 253 P.3d 302, 308 (Colo. 2011).

The Court of Appeals correctly concluded that the language of §12-47-801(4)(a)(I) is unambiguous. But even if plaintiff's contention that the word "knowingly" in this statute was ambiguous, the legislative history of H.B. 05-1183 confirms that the Court of Appeals' interpretation was correct. The pertinent legislative history underscores the Legislature's intent to expand social host liability to include providing "a place" for a person under the age of 21 to consume an alcoholic beverage, but also confirms that actual knowledge of the person's age was still an intended requirement of H.B. 05-1183.

History of Social Host Liability

At common law, neither an intoxicated person nor a person injured by an intoxicated person had a remedy against the provider of the alcohol. ***Lyons v. Nasby***, 770 P.2d 1250, 1253 (Colo. 1989). The rationale behind the rule was that the consumption of alcohol, rather than the provision of it, was the proximate cause

of any injuries suffered. ***Sigman v. Seafood Ltd. P'ship***, 817 P.2d 527, 529 (Colo. 1991).

In 1986, the Colorado Supreme Court recognized a common law dram shop action against vendors of alcoholic beverages by third parties injured by intoxicated persons. ***Largo Corp. v. Crespin***, 727 P.2d 1098, 1103-04 (Colo. 1986); ***Floyd v. Bartley***, 727 P.2d 1109, 1110 (Colo. 1986). In response, the Colorado General Assembly expressly abolished any common law cause of action against a vendor of alcohol or a social host who ". . . willfully and knowingly served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years . . . ." Section 12-47-128.5, C.R.S. (1986) (the predecessor to §12-47-801(4)(a)(I), C.R.S.). ***See Charlton v. Kimata***, 815 P.2d 946, 951 (Colo. 1991) (discussing the enactment of §12-47-128.5, C.R.S. (1986)). The dram shop statute not only abolished any common law cause of action against a vendor of alcoholic beverages or a social host who furnished alcoholic beverages, but also reinstated the common law rule that consumption of alcohol is the proximate cause of injuries inflicted by an intoxicated person. ***Strauch***, 253 P.3d at 307.

In 1997, the General Assembly replaced §12-47-128.5 with §12-47-801. 1997 Colo. Sess. L., pp. 284-285. The "social host" immunity section of the statute was contained in §12-47-801(4)(a), and provided as follows:

> 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 . . . .

Then, in 2005, the General Assembly amended the social host immunity section to read as follows:

> **SECTION 6**. 12-47-801(4)(a)(I), Colorado Revised Statutes, is amended to read:
>
> **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 . . .

2005 Colo. Sess. L., pp. 1244-45.

Plaintiff argues that the Court of Appeals incorrectly interpreted the current version of §12-47-801(4)(a)(I), C.R.S. to require that a social host have actual

knowledge that the person to whom he serves alcohol or furnishes a place to consume alcohol was under 21 years of age. Plaintiff's arguments are without merit.

Section 12-47-801(4)(a)(I), C.R.S. Requires Actual Knowledge of the Person's Age.

Plaintiff argues that §12-47-801(4)(a)(I) only requires that the social host knowingly provide the underage person a place to consume alcohol, not that the social host actually know whether the person was underage. Plaintiff is incorrect.

This argument was rejected by the Court of Appeals in ***Dickman v. Jackalope, Inc.***, 870 P.2d 1261 (Colo. App. 1994). In ***Dickman***, the defendant bar served alcoholic beverages to Dickman and Samantha Hunt. Neither Hunt nor Dickman were checked for identification while at the bar. At that time, Hunt was under 21 years of age. Later that evening, Hunt drove from the bar with Dickman as a passenger. Hunt lost control of the car, causing an accident which injured Dickman. Hunt was cited for driving under the influence of alcohol.

Dickman brought an action against the bar under §12-47-128.5(3), C.R.S. (the predecessor to §12-47-801, C.R.S.). Dickman argued that the statutory language ". . . the licensee knowingly and willfully sold or served any malt, vinous, or spirituous liquor to such person who was under the age of twenty-one years . . ." meant that the licensee knowingly sold or served the alcohol, not that the person to

whom the licensee served or sold alcohol was under the age of 21. The Court of Appeals disagreed. The Court reasoned:

> The terms 'willfully and knowingly' in §12-47-128.5 apply both to the words 'sold or served' and to the phrase 'to such person who was under the age of twenty-one years.' A different interpretation would render the 'willful and knowing' language meaningless since it is difficult to imagine any sales or service of alcohol by a licensee which are not deliberate.

870 P.2d at 1262.

Under ***Dickman***, plaintiff's attempt to torture the language of §12-47-801(4)(a)(I) to mean that the social host may be liable if he knowingly provides a place to consume an alcoholic beverage, but need not know that the person to whom he provided the place was under 21 necessarily fails. It is difficult to imagine a social host providing a place to consume alcohol without knowing he is doing so. The critical component of social host liability intended by the Legislature under §12-47-801(4)(a)(I) is that the social host know that the person to whom he provides a place to consume alcohol was under the age of 21.

In ***Dickman***, the Court of Appeals rejected the same argument plaintiff advances here because:

> [A]ny vendor serving or selling alcohol to a minor would be essentially strictly liable for injuries suffered as the result of the minor's intoxication. Even a licensee who is

> deceived by a fraudulent proof of age would be exposed to civil liability under such an interpretation.

870 P.2d at 1264. Similarly, under plaintiff's interpretation of §12-47-801(4)(a)(I), any social host who entertains a large group of people, such as the defendants in this case, would be strictly liable even if the social host was deceived by a fraudulent proof of age. If Torres had "carded" Sieck before he entered the Moorhead residence and Sieck produced a fraudulent identification, under plaintiff's theory Torres would be liable even though Torres had no reason to doubt that Sieck was over 21 years of age.

Further, under plaintiff's interpretation of §12-47-801, licensees must have actual knowledge that they are serving a person who is under the age of 21 under subsection (3)(a)(I), ***Strauch,*** a social host must have actual knowledge that the person to whom he is serving alcohol is under 21 years of age under subsection (4)(a)(I), ***Dickman,*** but a person who provides a place to consume alcohol would be liable under subsection (4)(a)(I) even though he did not know that the person who consumed the alcohol was under 21 years old. That construction makes no sense.

When this Court construes a statute, it reads and considers the statute as a whole and interprets it in a manner giving consistent, harmonious, and sensible effect to all of its parts. ***Stamp v. Vail Corp.,*** 172 P.3d 437, 444 (Colo. 2007). In

doing so, this Court does not interpret the statute so as to render any part of it either meaningless or absurd. ***Pierson v. Black Canyon Aggregates, Inc.,*** 48 P.3d 1215, 1220 (Colo. 2002). Plaintiff's interpretation of §12-47-801(4)(a)(I) is not consistent or sensible since the legislature could not have intended to immunize licensees and social hosts from liability absent actual knowledge that the person to whom they are providing alcohol is under 21 years of age, but to hold strictly liable a social host who provides a place to consume an alcoholic beverage.

Plaintiff also argues that the Court of Appeals' reasoning in ***Dickman*** does not apply to the 2005 amendments to §12-47-801(4)(a)(I). Plaintiff argues that changing the "standard" for social host liability from "willfully and knowingly" to "knowingly" eliminated the requirement of actual knowledge of the age of the person to whom the social host provided an alcoholic beverage, or provided a place to consume an alcoholic beverage. Plaintiff is incorrect.

First, plaintiff does not explain how removing the word "willfully" from "willfully and knowingly" changed the word "knowingly" to the phrase "knew or should have known." The terms "knowingly" and "willfully" in a legal context are essentially synonymous. For example, under §18-1-501(6), C.R.S., "a person acts 'knowingly' *or* 'willfully' with respect to conduct or to a circumstance described

by a statute defining an offense when he is aware that his conduct is of such nature and that such circumstance exists." (Emphasis added)

And the General Assembly is well aware of the distinction between actual knowledge (knowingly) and constructive knowledge (knew or should have known). In ***State ex rel Suthers v. Mandatory Poster Agency, Inc.***, 260 P.3d 9 (Colo. App. 2009), the Court of Appeals interpreted the word "knowingly" as used in §6-1-105(1), C.R.S. (2009) of the Colorado Consumer Protection Act ("CCPA"). In ***Suthers***, the State argued (as plaintiff argues here) that the term "knowingly" meant "knew or should have known." The Court of Appeals disagreed:

> Certain CCPA subsections, including those at issue here, required that a person 'knowingly' commit a deceptive trade practice. [Cite] Other provisions provide liability where the person committing the deceptive trade practice 'knows or should know' of the misrepresentation. [Cite] Thus, the Legislature chose to limit liability to circumstances where the violator has actual knowledge in certain subsections, while other subsections premise a violation on actual or constructive knowledge. The different mental states required to violate certain subsections reflect the Legislature's recognition that actual and constructive knowledge are distinct terms. [Cite]
>
> The state argues that the CCPA's underlying public policy of protecting consumers supports interpreting 'knowingly' as requiring actual or constructive knowledge. However, because the Legislature's intent is

> clear, we need not resort to other statutory interpretation principles. Moreover, the Legislature chose to impose differing state of mind requirements for certain violations, and we will not substitute our judgment for the General Assembly's. [Cite]

260 P.3d at 14.

Similarly, the General Assembly was aware that employing the word "knowingly" in §12-47-801(4)(a)(I) connoted actual knowledge. Had the General Assembly intended to impose liability on a social host for constructive knowledge, it would have employed the phrase "knows or should know" instead. ***Suthers.***

To further illustrate the General Assembly's awareness of the distinction between actual and constructive knowledge, it used the phrase "knew or should have known" in describing the duty a landowner owes an invitee under the Premises Liability Act. Section 13-21-115(3)(c)(I), C.R.S. ***See Lombard v. Colo. Outdoor Educ. Ctr., Inc,*** 187 P.3d 565, 571 (Colo. 2008) ("Colorado courts have consistently held that the phrase 'knew or should have known' is satisfied by actual or constructive knowledge, also referred to as the knowledge that one exercising reasonable diligence should have.").

Further support for the Court of Appeals' reasoning that the Legislature intended actual knowledge of the person's age under §12-47-801(4)(a)(I) is

provided by this Court's ***Strauch*** decision. There, the Supreme Court, interpreting licensee liability under §12-47-801(3)(a)(I), stated:

> As a result, liability depends on a finding that the liquor licensee *had a particular mental state*. In fact, this standard requires proof of a relatively high level of fault, because it turns on the licensee having *actual knowledge* of the patron's intoxicated state and willfully serving alcohol to the person anyway. It would not be enough that the licensee 'should have known' that the person was visibly intoxicated. (Emphasis added)

253 P.3d at 308. The statutory language this Court was interpreting in ***Strauch*** was the mirror image of the language the Court of Appeals was interpreting in ***Dickman.*** Both decisions focused on the word "knowingly" and concluded the word meant actual knowledge, not constructive knowledge.

Plaintiff argues that requiring actual knowledge would allow parents to leave dixie cups with Margaritas in their back yard and permit neighborhood children to come into the yard and drink them. In plaintiff's example, the parents know they are providing *children* a place to consume alcohol. Those parents have actual knowledge. Sieck was not a child and plaintiff has never suggested that Torres could have known Sieck was under 21 just by looking at him. ***Cf. Willis v. Strickland,*** 436 So.2d 1011, 1012 (Fla. App. 1983) ("The appearance of a person alone can impart knowledge of his or her age within certain ranges and to certain

degrees of certainty"), cited in ***Christoph for Aguero v. Colo. Commc'ns Corp.,*** 946 P.2d 519, 522-3 (Colo. App. 1997).

Plaintiff also argues that the sentence structure of §12-47-801(4)(a) must be read to impose liability on a social host who has a party at which *any person* is under the age of 21. (Op. br. at 26-28) Plaintiff argues that so long as *any person* who attended the party at the Moorhead residence and consumed alcohol there was under 21, Torres should be liable. This interpretation of the statute would lead to the following absurd result: Assume Sieck was over 21 years of age at the time of the party. Plaintiff contends that other guests at the party, including Steven Maury, was under 21. Both Sieck and Steven Maury consumed alcohol and became intoxicated. Since Steven Maury was *any person*, Torres would be liable for plaintiff's injuries even though there was no proximate causation between Torres' provision of a place to consume alcohol to *any person* under 21- Steven Maury - and plaintiff's injuries caused by the over-21 Sieck.

Section 12-47-801(4)(a)(I), C.R.S. is Not Ambiguous.

Next, plaintiff interprets the 2005 amendment to §12-47-801(4)(a)(I) as eliminating actual knowledge of a person's age as a liability prerequisite by resorting to legislative history. However, when the language of a statute is clear and unambiguous, the appellate courts apply the statute as written and do not resort

to the interpretive rules of statutory construction. ***Preston v. Dupont***, 35 P.3d 433, 437 (Colo. 2001). Only where statutory language is ambiguous do the courts consider legislative history to interpret statutory language. ***Vallagio at Inverness Residential Condo. Ass'n v. Metro. Homes, Inc.,*** 2017 CO 69, ¶25.

The Court of Appeals concluded that §12-47-801(4)(a)(I) is unambiguous. The Court was correct. Virtually the same language and sentence structure was interpreted by the Court of Appeals in ***Dickman***. There, the Court held that ". . . under the *plain language* of this statute a licensee may be held civilly liable only if the licensee knows that he or she is serving alcohol to a person under 21 years of age and willfully does so." (Emphasis added) 870 P.2d at 1262. Nor did this Court perceive any ambiguity in the word "knowingly" as provided in §12-47-801(3)(a)(I). ***Strauch.***

Similarly, under the plain language of §12-47-801(4)(a)(I) as amended in 2005, a social host may only be civilly liable if he ". . . knowingly provided the person under the age of 21 a place to consume an alcoholic beverage . . . ." Just as the words "willfully and knowingly" were held to apply both to the words "sold or served" and to the phrase "to such person who was under the age of 21 years" in ***Dickman***, the term "knowingly" applies both to the words "provided the person . . . a place to consume an alcoholic beverage" and to the phrase "under the age of

21." Therefore, this Court may not consult legislative history to interpret §12-47-801(4)(a)(I).

Legislative History Does Not Support Plaintiff's Interpretation of §12-47-801(4)(a)(I).

Assuming that the language of §12-47-801(4)(a)(I) was ambiguous, the statute's legislative history does not support plaintiff's interpretation. The recorded legislative history contained in the appellate record in this case does not reflect that the 2005 amendment eliminated actual knowledge of the person's age from the statutory liability equation. Instead, the legislative history demonstrates only that the General Assembly intended to extend a social host's liability beyond the physical service of alcohol to a person known to be under 21 to providing a person known to be under 21 a place to consume alcohol.

In ***Forrest v. Lorrigan,*** 833 P.2d 873 (Colo. App. 1992) the plaintiff brought an action under §12-47-801(4)(a)(I) against social hosts who did not furnish alcohol to underage guests, but allowed them to drink in their home. The Court of Appeals held that §12-47-801(4)(a)(I) imposed liability only on social hosts who serve alcohol to minors, not on social hosts who provide minors a place to consume alcohol. This was the "loophole" to which plaintiff refers in the legislative history of H.B 05-1183. But nothing in the legislative history reflects an intent to eliminate the requirement that the social host know that the person

consuming alcohol is under 21 years of age. (***See e.g.*** Samuel Stimson's motion for summary judgment, R. CF, pp. 800-802; House Judiciary Committee transcript of 2/17/05, R. CF, pp. 1218-1226; defendant Samuel Stimson's supplement to motion for summary judgment, R. CF, pp. 1169-72) The 2005 amendments to §12-47-801(4)(a)(I) were intended to address the Court of Appeals' ***Forrest*** holding, not its ***Dickman*** holding. Stated differently, there is no "kegger party" exception to the actual knowledge requirement stated in §12-47-801(4)(a)(I) as plaintiff contends.

Plaintiff also argues that the Legislature intended to eliminate the actual knowledge requirement by striking the word "willfully" from §12-47-801(4)(a)(I). But as argued above, plaintiff does not explain how striking the word "willfully" lowers the standard from actual knowledge to constructive knowledge. ***Cf. Suthers.***

Assuming it was necessary to resort to legislative history to interpret the General Assembly's intent in striking the word "willfully" from the statute, the following testimony of Murray Ogborn, Esq. representing the Colorado Trial Lawyers Association ("CTLA") at the February 17, 2005 House Judiciary Committee meeting refutes plaintiff's argument:

> **Mr. Ogborn**: . . . the amendment that is being proposed is to strike the words 'willfully and' from the language in

> the social host aspect of the bill. And, the singular purpose of this is to allow the parent or the elder brother or someone like that supplies keg to have access to homeowners insurance, the word 'willfully' takes it out of the purview of the insurance. So, if the insurance is not applicable then the victim would have, in many instances, no access to any monetary award at the hands of the jury. Um, this simply makes it so it is not an intentional tort, that can be less than intentional. *The knowingly remains.* (Emphasis added)

(R. CF, p. 1226) Thus, the legislative history behind striking the word "willfully" from the statute demonstrates the amendment was intended to trigger insurance coverage; it had nothing to do with changing the requirement that the social host have actual knowledge that the person to whom he is providing a place to consume alcohol was under the age of 21.

Willful Ignorance

Plaintiff argues that defendants' failure to inquire of each party guest whether he or she was over 21 years of age amounted to "willful ignorance," and that willful ignorance is the same as actual knowledge. It is not. This Court has equated willful ignorance with constructive knowledge. ***See Hicks v. Londre,*** 125 P.3d 452, 458 (Colo. 2005). Section 12-47-801(4)(a)(I) requires actual knowledge, not constructive knowledge.

In No Event is Plaintiff Entitled to Judgment as a Matter of Law

Finally, plaintiff argues that he is entitled to judgment as a matter of law. Assuming, *arguendo,* that §12-47-801(4)(a)(I) required only constructive knowledge, not actual knowledge, plaintiff would not be entitled to judgment as a matter of law on liability. Whether Torres had constructive knowledge of Sieck's age would be a question of fact for the jury. ***Cf. Elston v. Union Pac. R.R.,*** 74 P.3d 478, 483 (Colo. App. 2003).

Plaintiff's comparative negligence under §13-21-111, C.R.S. would also be a question of fact for the jury, ***Hesse v. McClintic,*** 176 P.3d 759, 764 (Colo. 2008), as would Sieck's non-party fault under §13-21-111.5(3), C.R.S. And if plaintiff's relative degree of fault exceeded Torres', plaintiff could not recover at all. Section 13-21-111(1), C.R.S.

V. CONCLUSION

Torres requests that this Court affirm the Court of Appeals' judgment.

Dated this 5th day of January, 2018.

Respectfully submitted,

s/Alan Epstein
Alan Epstein #10473
Hall & Evans, L.L.C.
1001 Seventeenth Street, Suite 300
Denver, Colorado 80202
303-628-3300
303-628-3368 (fax)
epsteina@hallevans.com

Thomas E. Hames, #13743
Ray Lego & Associates
6060 S. Willow Dr., Suite 100
Greenwood Village, CO 80111
720-963-7000
720-963-7001 (fax)
thames@spt.com

ATTORNEY FOR DEFENDANT
CHRISTOPHER TORRES

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2018, a true and correct copy of the foregoing **ANSWER BRIEF** was, unless otherwise noted, served on the following via Colorado Courts E-Filing:

A. Troy Ciccarelli
Ciccarelli & Associates, P.C.
2616 W. Alamo Avenue
Littleton, CO 80120

Timms R. Fowler
The Fowler Law Firm, LLC
155 East Boardwalk Dr., Suite 300
Fort Collins, CO 80525

Thomas E. Hames
Ray Lego & Associates
6060 S. Willow Dr., Suite 100
Greenwood Village, CO 80111

Michael W. Morrissey
Morrissey Law Office
1901 W. Littleton Blvd., Suite 200
Littleton, CO 80120

Paul Prendergast
Prendergast & Associates, P.C.
1901 W. Littleton Blvd., Suite 200
Littleton, CO 80120

Colin C. Campbell
Campbell, Latiolais & Averbach, LLC
825 Logan Street
Denver, CO 80203-3114

s/Denise Y. Gutierrez