DATE FILED: January 5, 2018 1:56 PM
FILING ID: C835F4449EB53
CASE NUMBER: 2017SC15

SUPREME COURT, STATE OF COLORADO
2 East 14th Ave.
Denver, CO 80203
Telephone: (720) 625-5150

Appeal From:
COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, Colorado 80203

District Court, Boulder County, Colorado
Case No. 12CV540
The Hon. Bruce Langer and The Hon. Judith L. LaBuda

▲ COURT USE ONLY ▲

Case No.: 2017SC15

Petitioner:

JARED J. PRZEKURAT, By and Through His Parent, Co-Guardian, Co-Conservator And Next Friend, JEROME PRZEKURAT

v.

Respondents:

CHRISTOPHER TORRES, SAMUEL S. STIMSON, MITCHELL DAVIS and PETER STIMSON

Attorneys for Respondent Mitchell Davis
Colin C. Campbell, Atty. Reg. No. 12193
CAMPBELL, LATIOLAIS & AVERBACH, LLC
825 Logan Street
Denver, Colorado 80203
Phone: (303) 831-5990
E-mail: ccampbell@cla-law.net

RESPONDENT MITCHELL DAVIS' ANSWER BRIEF

Respondent, Mitchell Davis, by his attorneys Campbell, Latiolais & Averbach, LLC, hereby submits his Answer Brief.

CERTIFICATION

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 C.A.R. 28(g).
Choose one:
__X__ It contains 4,083 words.
__X__ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).
_____ For the party raising the issue:
(1) It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and
(2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on.

__X__ For the party responding to the issue:
It contains, under separate headings, statements of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal; and, if not, why not.

CAMPBELL LATIOLAIS & AVERBACH, LLC
Signed original document maintained and available pursuant to Rule 121.

s/ Colin C. Campbell
Colin C. Campbell, Esq.

TABLE OF CONTENTS

Contents:

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

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 host threw a party and operated 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

Petitioner Jared Przekurat brought this lawsuit to recover for personal injuries which he sustained in a catastrophic single-car accident. Przekurat was riding as a passenger in a car driven by his friend Hank Sieck. Previously that evening, Przekurat and Sieck had attended a party hosted by the four Respondents Christopher Torres, Samuel Stimson, Peter Stimson and Mitchell Davis. Przekurat was twenty-one years of age at the time, while Sieck was twenty years old. Sieck was intoxicated at the time of the accident.

Through this lawsuit, Przekurat has sought to establish social host liability upon the Respondents pursuant to the Colorado Dram Shop Act, C.R.S. § 12-47-801. By its terms, the Colorado Dram Shop Act imposes civil liability upon a social host who has knowingly served alcoholic beverages to a person under the age of

twenty-one, or who "knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage."

Przekurat's lawsuit raised an issue of statutory interpretation as to whether the statutory modifier "knowingly" applies to both elements of dram shop liability; that is, whether to be found liable, a social host defendant must be aware not only that he or she has provided a place for an underage person to consume alcohol, but also that the social host knew the person consuming alcohol on their premises was in fact under the age of twenty-one.

Each of the Respondents moved for summary judgment upon grounds that none of them had invited Hank Sieck to the party, and did not know that he was under twenty-one. The trial court granted Respondents' respective motions for summary judgment. Przekurat appealed, and the court of appeals affirmed the summary judgment ruling in Respondents' favor. In affirming summary judgment, the court of appeals ruled that the word "knowingly" applies to both the act of providing a place for a person to consume an alcoholic beverage as well as to the age of the drinker. The court of appeals reasoned that such interpretation is consistent not only with its prior decision in *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo. App. 1994), but is also in accord with the more general rule of statutory construction that a term used in a statute should be given consistent application throughout the entirety of the statute, to apply to each element of the statutory claim.

B. Statement of Facts

The pertinent facts were fairly summarized in the court of appeals' slip op. As stated in ¶ 6 thereof, the Respondent hosts shared a house in Boulder. To celebrate Davis' twenty-fourth birthday and Torres' graduation from college, they planned a party at the house. The hosts invited numerous people to the party, hired a disc jockey, and provided two kegs of beer.

For his part, Mitchell Davis did not invite any underage drinkers to the party. Davis, who was twenty-four years old, testified that "I invited people that were my age because those are my friends." CF at p. 21. Davis was never made aware that any underage persons attended the party. CF at p. 713. Davis did not know either Victor Mejia or Hank Sieck, and did not encounter either of them at the party. CF, at pp. 718, 721.

Przekurat states on page 10 of his Opening Brief that Robert Fix, who invited Victor Mejia who in turn invited Hank Sieck, "had full authority from the Defendants to invite whomever he wanted to the party, including invitees under the age of twenty-one." This statement is unsupported by the record. Fix's testimony was to the contrary, as he testified in deposition that he had neither authorization nor permission to invite underage persons to the party:

> Q: Okay. Do you think that you had authorization or permission to invite those people who are underage to come and then drink at the party?

A: No.

CF at p. 989. For his part, Mitchell Davis gave no authority to Robert Fix or anyone else to invite underage persons to the party. CF at 712. Nor was Davis ever made aware that any of the attendees were underage. CF at 713.

The Court of Appeals' slip. op. noted Przekurat's position to be that the hosts knew they were hosting an "open" party and provided a venue to underage guests, including Sieck, to drink indiscriminately. After noting this position, the Court of Appeals went on to conclude that "because the summary judgement record does not support Przekurat's contention, we reject it." Slip op., ¶ 30.

Przekurat has neither sought nor been granted certiorari review of the court of appeals' recitation of the relevant facts. Przekurat has also not challenged through its Petition of Certiorari the court of appeals' determination that there was insufficient circumstantial evidence to establish the Defendants had any reason to know Sieck was underage, since there was no evidence that Sieck appeared to be less than twenty-one. We can therefore accept for purposes of addressing the issue under review that Davis did not invite Hack Sieck to the party, did not encounter Sieck at the party and did not know that underage persons were in attendance.

In granting the Petition for Certiorari, this Court framed the issue as one of whether the court of appeals negated the duty imposed by H.B. 05-1183 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. Respondent Davis respectfully submits that the issue as framed assumes facts which do not apply to him, and which the court of appeals rejected as unsupported by the record. The record establishes that Respondent Davis did not open the venue to anyone of any age – rather, he only invited persons who he knew to be over twenty-one, and he did not provide license to any else to invite underage persons to the party.

III. SUMMARY OF ARGUMENT

The Court of Appeals followed established precedent in interpreting C.R.S. § 12-47-801 (4)(a)(I) to mean that the word "knowingly" applies to both the act of providing a place for a person to consume alcoholic beverage as well as to the age of the drinker. This interpretation is consistent with that employed in *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo. App. 1994), a decision of which the legislature was aware when it passed the 2005 amendments to the Colorado Dram Shop Act.

There is nothing contained within House Bill 05-1183's legislature history to suggest a legislative intent to restrict application of the word "knowingly" to just the act of providing an underage person a place to drink. The "loophole" intended to be closed by the 2005 amendments was that implicated by a social host who knowingly allows persons whom the host knows to be underage to drink on the host's premises. The legislative history contains no mention of imposing liability

upon a host who unwittingly allows a place for a person to drink whom the host has no reason to believe is underage.

The Court of Appeals' interpretation does not frustrate the intended purpose of House Bill 05-1183. Under the court of appeals' rationale, a social host's knowledge that a drinker is underage can be established through circumstantial evidence; that is, a social host may be found liable if the host allows a person to drink on the host's premises if the drinker appears to be less than twenty-one, or there are other surrounding circumstances which would indicate to the host that the drinker is underage. The Court of Appeals properly affirmed summary judgment in favor of Respondent Mitchell Davis because Davis did not invite any underage persons to the party, and the record contains no circumstantial evidence to suggest that Davis ever encountered Hank Sieck, much less that Davis had any reason to consider Sieck to be under twenty-one.

IV. ARGUMENT

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

Respondent Davis agrees that the issue upon review, which involves statutory interpretation, present a question of law subject to de novo review.

Respondent Davis further agrees that Petitioner preserved the issue through its briefing on the Respondents' motions for summary judgment.

B. The Court of Appeals appropriately interpreted C.R.S. § 12-47-801 in accordance with prior legal precedent and accepted principles of statutory construction.

Respondent Davis agrees with Plaintiff's premise that the 2005 amendments to the Colorado Dram Shop Act expanded the scope of social host liability. The court of appeals recognized as much in ¶28 of its slip opinion. Prior to the 2005 amendments, social host liability was limited to only those hosts who willfully and knowingly served alcoholic beverage to a person under the age of twenty-one years. The 2005 amendments not only deleted "willfully" from the equation, they also added language imposing liability for knowingly providing a person under the age of twenty-one a place to consume an alcoholic beverage.

The circumstances addressed in *Forrest v. Lorrigan*, 833 P.2d 873 (Colo. App. 1992) provides an example of the manner in which the 2005 amendments expanded the scope of social host liability. In *Forrest*, a mother not only permitted her 18-year old daughter to host a party in her home at which the mother was aware alcohol was to be served, but also actually assisted her daughter to procure the alcohol. The mother was held to have no social host dram shop liability for an ensuing car accident caused by an under-age drinker at the party, since the mother did not actually serve any alcohol to the guests. Under the then-existent version of the dram shop statute, the mother's limited role exculpated her from social host liability. However, under the 2005 amendments, the mother could indeed be found

liable, since she was aware she was permitting under-age friends of her daughter to drink in her home.

Petitioner's Opening Brief cites repeatedly to the legislature's intent to close the "loophole" made apparent by *Forrest*. Davis agrees this was indeed the legislative intent. However, the "loophole" being addressed was the situation typified by *Forres*t wherein a person allows alcohol to be served on their premises to guests whom the social host knows to be underage. The 2005 amendments closed this loophole by imposing statutory social host liability upon those who provide a place for under-age persons to drink, knowing that the persons are indeed underage.

The "loophole" presented by *Forrest* is different than the issue presented here. In this instance, unlike *Forrest*, Plaintiff presented no evidence that Davis, or for that matter any other Respondents knew Sieck to be underage. Nor was there any circumstantial evidence in such regard, as Przekurat presented no evidence that the twenty-year-old Sieck appeared to be obviously underage. court of appeals' slip op., ¶37.

The question presented, then, is not one of whether the 2005 amendments expanded social host liability. Rather, the question presented is the extent to which the amendments expanded social host liability – specifically, whether a plaintiff must prove that the social host defendant knew that the person who consumed alcohol at their place was under the age of twenty-one.

The Court of Appeals appropriately looked to *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo. App. 1994) for guidance in answering this question. After all, *Dickman* was decided in advance of the 2005 amendments, such that legislature was presumed to be aware of such decision in framing the 2005 amendments. *Dickman* also addressed an analogous situation to that presented here, in that it addressed the meaning of the elements of liability against a licensee which "willfully and knowingly sold or served any alcohol beverage to such person who was under the age of twenty-one years or who was visibly intoxicated." The specific question addressed in *Dickman* was whether a plaintiff must prove the liquor licensee knew the person to whom it served alcohol was under the age of twenty-one. In *Dickman*, the Court of Appeals applied the rule that when a criminal statute proscribes a culpable mental state, that mental state applies to every element of the offense unless the statute provides otherwise. Hence, to prove liability against the licensee, a plaintiff must prove not only that the licensee knowingly served a person who happens to have been underage, but also that the licensee knew the person served to be under twenty-one.

Przekurat argues that the court of appeals should not have looked at *Dickman* for guidance, given that *Dickman* was decided in the differing context of a liquor licensee's liability. Yet Przekurat's argument begs the issue. While liquor licensee liability and social host liability involve different elements, they both employ a

threshold "knowingly" scienter element. A liquor licensee is liable if it knowingly serves a person who is under the age of twenty-one, while a social host is liable if the host knowingly provides a person under the age of twenty-one a place to consume an alcoholic beverage. The question open to interpretation remains the same for both – i.e., does the "knowingly" modifier require that the liquor licensee, or alternatively the social host, know the person consuming alcohol on their premises is under twenty-one? There is no reason why that question should be answered differently for social hosts than it is for liquor licensees. Hence, the fact that the legislature is presumed to have known of the construction of the statute in *Dickman* means that *Dickman* is indeed instructive on this particular issue, and the court of appeals had good cause to place reliance upon *Dickman* in deciding the corresponding issue with respect to social host liability in this instance.

C. Legislative history provides no guidance as to legislative intent regarding the issue presented.

Given that the court of appeals' decision here is indeed consistent with that in *Dickman*, we must then look to whether there is anything stated within the wording of the 2005 amendments, or in the legislative history, which indicates a different legislative intent. In other words, is there anything within the statute or the legislative history which suggests a social host is to be found liable even though the social host was unaware that the person drinking at their premises was underage?

Davis submits the statute and legislative history are both silent on this issue. Neither the legislative declaration in House Bill 05-1183, nor the legislative history contained in the record, make mention of any kind as to whether liability is to be imposed against a social host even though the social host was unaware that the person drinking on their premises was underage.

The competent legislative history is found in the transcribed hearing testimony excerpts found at pages 1147 – 1155 of the Record. These excerpts are replete with comments regarding the intent of the 2005 amendments to impose liability upon not only those who knowingly serve alcohol to minors, but also upon those who knowingly provide a place for underage persons to drink. However, none of the testimony, whether provided by bill sponsor Representative Paccione or otherwise, speaks to whether the legislature intended to extend such liability to those who are unaware that the persons whom they are allowing to drink on the premises are underage. Stated another way, the legislative history is altogether silent as to whether the "knowingly" element applies to both the act of providing a place to drink as well as to the age of the drinker. In the absence of useful legislative history, we are left to discern the legislative intent from the terms of the statute itself, with the guidance of past legal decisions addressing similar statutory schemes. This is precisely how the court of appeals proceeded.

Petitioners did rely before the trial court upon an affidavit submitted by Representative Paccione, but the court of appeals quite rightly disregarded the affidavit, upon grounds that a sponsor's stated personal view as to what the legislature intended is not competent evidence to determine judicial intent. *See Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 582 n. 3 (1982). Representative Paccione may well have thought the house bill amendment would serve to impose liability against a social host who unwittingly allowed a minor to drink on the host's premises, but that is not the way the bill was written as passed by the legislature.

D. The Court of Appeals' interpretation furthers, and does not negate the duty created by the 2005 amendments.

Accepting the expansive interpretation advocated by Przekurat would result in creating greater obligations upon a social host beyond those contemplated by the 2005 amendments. Under the particular facts of this case – wherein Mitchell Davis did not invite any underage persons to the party, never met Hank Sieck, and received no indication that Sieck appeared to be underage – the only way Davis would have become aware Sieck was underage would have been if the hosts were to require all attendees to show their driver's license at the door. Presumably, the legislature could impose such a requirement upon social hosts, but it has not done so to this point. Absent such a specific legislative prescription, no such obligation should be read into the statute by judicial fiat.

Davis disagrees with Petitioners' and Amicus CTLA's stated premise that the court of appeals' decision would encourage social hosts to turn a blind eye to the apparent youthfulness of a person attending the host's party. On the contrary, the court of appeals acknowledged that a defendant social host's awareness that a drinker is underage can be established through circumstantial evidence. If a host allows alcohol to be served to a person who visibly appears to be underage – or does so under circumstances wherein the youthfulness of the attendees would be otherwise apparent, such as at a high school graduation party – then a plaintiff could establish the defendant social host's awareness of the drinker's tender age through such circumstantial evidence.

The ability to establish the "knowingly" element through circumstantial evidence is precisely why Przekurat's stated example of parents placing margaritas in Dixie cups at a sandbox piñata birthday party is off point. Under that example, the offending parent's awareness that they were providing alcohol to underage persons would be easily demonstrated through circumstantial evidence, thereby imposing social host liability upon such wayward parents. The same would hold true with regard to a teen-age party, wherein the youth of the drinkers would be apparent from their appearance or other circumstances. The parade of horribles envisioned by Petitioner and Amicus CTLA is more imagined than real, since the ability to establish a social host's knowledge that a guest is underage through

circumstantial evidence provides a mechanism to impose liability upon a host who blindly presumes a guest drinker is of age despite the presence of apparent indicators to the contrary.

Whether there is sufficient circumstantial evidence to demonstrate a host's awareness that the drinker is underage is a fact-specific exercise. Again, Przekurat has not challenged through his Petition for Certiorari the court of appeals' determination that no such circumstantial evidence was presented in the record, and such is not a stated basis for the present appeal. Respondent Davis submits this case is less about debating the societal goals of preventing underage drinking, and more about Petitioner's inability to meet his burden of proof. The parties agree the 2005 amendments were intended to impose liability upon social hosts who allow alcohol to be served to those whom the hosts know – whether directly or circumstantially – to be under twenty-one. Summary judgment was affirmed not because Petitioner was denied an opportunity to prove that Respondents, or each of them were aware of circumstances as would indicate to them that they were permitting under-age drinkers to be served. Rather, summary judgment was affirmed because the factual record did not provide any indication that Respondents had information to show that Sieck, or for that matter any other attendees, were underage.

The ability to prove actual knowledge through circumstantial evidence also speaks to this Court's apparent concern that H.B. 05-1183 not be interpreted in such

a fashion as to encourage persons to hold a party with alcoholic beverages "open to anyone of any age." Respondent Davis submits that the court of appeals' opinion does not provide for such a lax standard for social host liability. Under the court of appeal's analysis, if a host were to open a party to anyone of any age, and circumstances thereafter establish that the social host would have been aware of the presence of underage drinkers – whether by virtue of youthful appearance or knowledge of other indications of age (by way of example, friends of a host's 18-year-old daughter) – then the Dram Shop Act as interpreted by the court of appeals would still impose liability upon the offending host. In short, the court of appeals' analysis allows for imposition of liability against those expressly targeted for liability under House Bill 05-1183, while protecting others who fall outside of the ambit of social host liability. The court of appeals affirmed summary judgment because it found the record did not establish that persons "of any age" were welcome to attend.

We should not lose sight of the fact that the court of appeals did not discern sufficient circumstantial evidence in the record to support an inference that any of the Respondents – and most certainly not Respondent Davis – had reason to be aware that Sieck was at their party, much less that Sieck was underage. Again, should the legislature wish to prescribe an obligation on the part of social hosts to "card" party attendees – and by doing so, effectively equate social host dram shop liability with

that of liquor licensee liability – it may well have the authority to do so, but has not yet taken that step.

In pages 13-14 of its Brief, Amicus CTLA acknowledged the need to balance society's interest in holding social hosts responsible for preventing needless injury with the concomitant interest in controlling the scope of a person's liability for a third-party's actions. Respondent Davis submits the court of appeals' opinion strikes the appropriate balance by upholding the 2005 amendments' stated purpose of holding accountable those who serve alcohol to those whom the host is proven (by direct or circumstantial evidence) to have been aware of the drinker's tender age, while refusing to expand social host liability beyond the parameters established by the statutory terms themselves.

It is alarming that Petitioner asks this Court to remand "for a trial on the merits limited to the issue of damages …." In effect, Petitioner advocates for strict liability. Amicus CTLA adopts a more nuanced approach, in citing with approval to other states' statutes which impose liability upon a host who allows a person to be served alcohol whom the host "knows or reasonably should know" to be less than twenty-one. CTLA's argument calls for two responses. First, if the legislature had wished to establish a "knew or should have known" standard, then it could have done so, but chose not to. Second, the public policy behind imposing a "should have known standard" is still largely accomplished through the court of appeals' recognition that

"knowingly" can be established through circumstantial evidence. When it is apparent from the circumstances that a social guest is likely to be less than twenty-one, then there is little practical difference between concluding the host "should have known" the drinker was underage and concluding that the host's awareness of the drinker's tender has been proven through circumstantial evidence.

V. CONCLUSION

For the reasons expressed above, Respondent Mitchell Davis submits that the answer to the stated issue on appeal should be "no." The court of appeals did not negate the duty imposed by H.B. 05-1183, because H.B. 05-1183 did not impose a strict liability standard upon social hosts, nor impose an obligation to "card" guests commensurate with that owed by liquor licensees. Because Petitioner failed to present circumstantial evidence as would indicate to Respondents that Hank Sieck was underage, the court of appeals properly applied the elements of social host dram shop liability in affirming the summary judgment in Respondents' favor. Respondent Mitchell Davis accordingly requests this Court to uphold the court of appeals' decision and affirm the summary judgment entered in his favor.

Respectfully submitted this 4th day of January, 2018.

CAMPBELL, LATIOLAIS & AVERBACH, LLC
Original signature is on file at Campbell, Latiolais & Averbach, LLC, pursuant to C.R.C.P. 121 § 1-26

By: *s/ Colin C. Campbell*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2018, a true and correct copy of the foregoing **RESPONDENT MITCHELL DAVIS' ANSWER BRIEF** was filed and served electronically via the Colorado Court's E-Filing System upon the following:

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

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

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

Alan Epstein, Esq.
Hall & Evans, LLC
1001 17th Street, Suite 300
Denver, CO 80202
Attorneys for Defendant-Appellee Christopher Torres

Paul Prendergast, Esq.
Prendergast & Associates, P.C.
1901 W. Littleton Blvd., Suite 200
Littleton, CO 80120
Attorneys for Defendant-Appellees Peter Stimson and Samuel Stimson

Jessica L. Derakhshanian, Esq.
Nelson Boyle, Esq.
Burg Simpson Eldredge Hersh Jardine, PC
40 Inverness Drive East
Englewood, CO 80112
Attorneys for Amicus Curiae The Colorado Trial Lawyers Association

s/ Stacey M. Curtin