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SUPREME COURT, STATE OF COLORADO
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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

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

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Case No.: 2017SC15

RESPONDENTS SAMUEL STIMSON'S AND PETER STIMSON'S ANSWER BRIEF

Respondents, Samuel and Peter Stimson, by their attorneys, The Prendergast Law Firm, P.C., hereby submit this 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 5,620 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.

THE PRENDERGAST LAW FIRM, P.C.
Signed original document maintained and available pursuant to Rule 121.

s/ Paul A. Prendergast
Paul A. Prendergast, 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 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.

In 2012, Petitioner, Jared Przekurat ("Petitioner"), brought this lawsuit to recover for personal injuries which he sustained in a catastrophic single-car accident. Petitioner, having driven to Boulder earlier in the evening to attend a party, was traveling home as a passenger in his own car, driven by his friend Hank Sieck ("Sieck"). Petitioner and Sieck attended a party hosted by the four Respondents, Christopher Torres, Mitchell Davis, Samuel Stimson, and Peter Stimson, at their home. Petitioner was twenty-one years of age at the time, while Sieck was twenty years and nine months old. Sieck and Petitioner were both intoxicated at the time of the accident.

Petitioner sought to establish "social host liability" for the Respondents through the Colorado Dram Shop Act, C.R.S. § 12-47- 801(4)(a)(I). Petitioner argued that the

current Dram Shop Act imposes civil liability upon a showing of "constructive knowledge" by a social host who allegedly provides a person under the age of twenty-one a place to consume an alcoholic beverage.

Respondents assert that the current Dram Shop Act imposes civil liability only after a showing that a social host had "actual knowledge" of the facts that give rise to liability and that constructive knowledge does not satisfy the statutes "knowingly" requirement. Further, Respondents asserted that they did not knowingly provide to Sieck, the person under the age of twenty-one, a place to consume an alcoholic beverage, because Sieck was not invited by either of the Stimsons, and he was, in fact, a party crasher at their home celebration that was intended to be a birthday party for Mitchell Davis, as he was turning 24, and a celebration for Christopher Torres who was graduating from college, and who was 22 years old. The Stimsons established that they had no knowledge that Sieck was even present at their home that evening. Samuel Stimson's testimony went uncontradicted, establishing that he did not attend the party, instead, he and a friend spent the evening in his room, away from the activities of the party. (CF 991, Samuel Stimson depo. p. 23-24)

Przekurat's tendered evidence, in response to Respondents' motions for summary judgment, failed to establish facts in the record for the following: (1) that Respondents Peter Stimson and Samuel Stimson (collectively, the "Stimsons") knew Sieck; (2) that either of the Stimsons had seen Sieck at the party; (3) that either of the Stimsons had ever spoken to Sieck; (4) that anyone had ever informed either of the

Stimsons that Sieck was present at their home or that Sieck was just under twenty-one and nine months-old; (5) that Sieck was invited by either of the Stimsons; (6) that either of the Stimsons had been informed or knew that Sieck was drinking at the party; (7) that Sieck ever introduced himself to either of the Stimsons; (8) that either of the Stimsons could have determined by looking at Sieck that he was likely underage; (9) that either of the Stimsons were put on notice that Sieck was underage; (10) and, that Samuel Stimson actually attended the party.

In granting the Petition for Certiorari on July 3, 2017, this Court framed the issue as "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."

The Stimsons, respectfully point out that the grant of certiorari, by this Court, on the courts designation of issue, appears to indicate or suggest that H.B. 05-1183 imposed a duty, as the Petitioner has described as "Do not knowingly provide a place for underage social guests to drink" (petitioners Opening Brief p. 21) and also appears to indicate or suggest that the hosts threw a party and opened the venue to anyone of any age. Again, the Petitioner has suggested ([T]he courts below allowed the Defendants, as social hosts, to throw a wide-open "Kegger" with impunity...") (Petitioner's Opening Brief p. 22). The Trial Court did not find these suggested facts, nor did the Court of Appeals find these suggested facts. Both lower courts reviewed

the entire record, and, neither court found facts to support Petitioner's assertions, nor did they find that a duty, as defined by Petitioner, as stated above, was created by H.B. 05-1183.

The Stimsons each moved for summary judgment upon grounds that there was no genuine issue of fact regarding their lack of knowledge of Sieck's under-age status, and that there was no genuine issue of fact regarding their lack of knowledge of having provided a place for Sieck, a person under twenty-one, to consume alcohol.

The Trial Court granted Respondents' respective motions for summary judgment, finding that Petitioner had the obligation to provide facts to show that the Stimsons had "actual knowledge" of Sieck and Sieck's age, and that Petitioner had the obligation to provide facts to show that the Stimsons had "actual knowledge" that they were providing a place for the person under the age of twenty-one, (Sieck) to consume alcohol. After reviewing the entire record, the Trial Court could not find any evidence that either of the Stimsons had actual knowledge that Sieck was under the age of 21 and knowingly allowed Sieck to consume alcohol on Respondent's property. Petitioner failed to establish that there were facts that established disputed issues of material fact regarding these two critical points as required by C.R.S. § 12-47-801(4)(a)(I) and C.R.C.P. 56(c).

Petitioner appealed, and the Court of Appeals also found summary judgment was appropriate when it upheld the Trial Court's finding that "knowingly" means acting with the state of mind or *mens rea* of "actual knowledge" and that required

showing of "knowingly," applies to both **the act** of providing a place for an under-age person to consume an alcoholic beverage as well as to knowledge of the person under the age of twenty-one. The Court of Appeals also reviewed the entire record, *de novo*, and independently concluded that Petitioner "did not offer any evidence, *circumstantial or direct*, that would permit a reasonable inference that any of the hosts knew Sieck, much less that they knew his age. Petitioner did not present any evidence that the twenty-year and nine-month-old Sieck appeared to be underage. "Without knowledge, established either by *direct or circumstantial* evidence, of Sieck's age, the host could not have knowingly provided Sieck, a person under the age of twenty-one, with a place to consume alcohol." *Przekurat v. Torres*, 2016COA117, 15CA1327 Colorado (emphasis added).

Petitioner and the Respondents differ on how courts should apply the term "knowingly." Respondents clearly assert that the statutory modifier "knowingly" applies to both the age of the person under the age of twenty-one and provides that person a place to consume an alcoholic beverage. Respondents agree with the Trial Court and the Court of Appeals that "knowingly" means with actual knowledge. In this case, the Petitioner has asserted, as the Court of Appeals described, "an expansive interpretation of the statute," suggesting that his burden was not to establish that the Respondents actually knew that they were providing Sieck, a person under twenty-one, a place to drink, and that it was not his burden to establish that the Respondents actually knew that Sieck was a person under twenty-one. Instead, Petitioner argued

that "knowingly" as used in one part of the statute (3)(a)(1) meant something different when used just four sentences later in the same section at (4)(a)(1). Our state statute, C.R.S. §12-47-801 does not ascribe "knowingly" with two different meanings, in the same section, the way this statute is written.

B. Statement of Facts

The pertinent facts were fairly summarized in the Colorado Court of Appeals' opinion as stated in paragraph 6 thereof (2016COA117, 15CA1327).

For their part, neither of the Stimsons invited Sieck or Petitioner to their home, nor did they authorize anyone else to invite Sieck or Petitioner to their home. Davis, who was 24 years old, testified that, "I invited people that were my age because those are my friends." (CF at p. 21.)

Further, the Stimsons both agree with Mitchell Davis when he notes in his Answer Brief that in Petitioners Petition for Certiorari, Petitioner has not challenged the Court of Appeals' determination that there was insufficient direct or circumstantial evidence to establish the Respondents had any reason to know that Sieck was just underage, since there was no evidence that Sieck appeared to be less than twenty-one. It is important to note that *neither of the Stimsons even laid eyes on Sieck that evening.*

Samuel Stimson established through unchallenged testimony that he spent the evening of the party in his room, away from others who attended the party that evening.

SUMMARY OF ARGUMENT

III. ARGUMENT

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

The Stimsons agree that the issue upon Certiorari, which involves statutory interpretation, is best described as a question of law, subject to *de novo* review. Further, they agree that Petitioner preserved the limited issue authorized by this Court's grant of Certiorari through his briefing on the Stimson's separate motions for summary judgment.

B. This Court limited grant of Certiorari focuses our attention on the narrow issue of "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."

To this grant of certiorari, the Stimsons, Samuel and Peter, affirmatively state that 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 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.

1. *The Duty*. The Stimsons would first identify the duty imposed upon social hosts by H.B. 05-1183, asserting that the Petitioners formulation is incorrect and not even a complete version of the statute at issue. H.B. 05-1183 is an amendment to Colorado's Dram Shop Act, codified at C.R.S. § 12-47-801. The Legislative declaration for that amendment does not speak to anything definitive regarding a duty not to knowingly provide (Sieck) the person under the age of twenty-one a place to consume an alcoholic beverage. By following the plain meaning of the words in the statute, as well as precedent, both the Trial Court and the Court of Appeals established, and enforced the plain language of the statute in stating the "duty" found in H.B. 05-1183 does not impose liability upon a social host when any injured individual suffers because of the intoxication of any person due to the consumption of such alcohol beverages, except when it is proven that the social host knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage.

Here, neither court below negated the duty that the Petitioner proposes. Instead, both courts disagreed with his formulation and they correctly applied "knowingly," the mental state imposed by the General Assembly, to every element of the offense unless the statute provides otherwise, citing *Dickman v. Jackalope, Inc*., 870 P.2d 1261 (Colo. App. 1994), (which in turn relied upon C.R.S. § 18-1-503(4)). *Huddleston v. Bd. of Equalization*, 31 P.3d 155 (Colo 2001) (Knowingly applies to all of the elements of liability); *Colo. Common*

Cause v. Meyer, 758 P.2d 153 (Colo. 1988); *Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983) (finding that Colorado's common law formulation is same as modern statute); *People v. Coleby*, 34 P.3d 422 (Colo 2001); See *also*, *Griego v. People*, 19 P.3d 1 (Colo. 2001) (concerning the notice aspect of knowingly).

2. Knowingly provided the person under the age of twenty-one. In 2005, the Colorado General Assembly added a new clause to the end of subparagraph (I) of paragraph (a) of subsection (4) that reads "or knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage..." The duty that was added by this amendment H.B. 05-1183 is not expressly stated. Under this circumstance, a court must ascertain and effectuate the intent of the General Assembly, by looking first to the statutory language, giving words and phrases their plain and ordinary meanings according to the rules of grammar and common usage. In doing so this court has instructed lower courts to read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme, giving consistent, harmonious, and sensible effect to all of the statute's language. If after doing this, a court determines that the statute is not ambiguous, the court is to enforce it as written and not resort to other rules of statutory construction. It has been explained that if possible, courts must give effect to every word of the statute. *See*, *Vanderborgh* v. *Kruth*, 2016 COA 27. ¶8; *Krol* v. *CF & I Steel*, 2013 COA 32 ¶ 15; C.R.S. § 2-4-101. *See also*, Johnston

v. City Council of City of Greenwood Village, 493 P.2d 651, 654 (Colo. 1972); *Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991).

Petitioner has asserted that a court cannot read C.R.S. § 12-47-801 and understand it's plain meaning. Respondents disagree and note that there are no difficult words, concepts, or formulations contained in C.R.S. 12-47-801. Petitioner suggests that legislative history shows that the legislative intent of the General Assembly was to impose liability upon social hosts for having what he describes as "wide open parties' where underage persons can drink "indiscriminately." He goes on to suggest that social hosts must police the access to hosts homes at the front door to check for I.D.'s, that latched fence gates in hosts fenced in yards should be "maned", that cups that gests use (such as red solo cups) should be monitored, that police officers could be hired to attend social host parties, he asked if any of the social hosts took keys away from their guests upon arrival to insure that they did not drive home drunk, he inquired whether cab rides were paid to guests by their social hosts.

This of course assumes that social hosts must anticipate that under age, non-invited, party crashers will attempt to crash a host's party with an intent to drink at the social hosts premises. This approach would stand existing analysis on it's head. We have come to learn that courts can not search legislative history for a legislative intent that they prefer, then use that imputed intent to justify an argument that Petitioners are making here, namely, the legislature said they

wanted one thing, but they wrote it the wrong way, so, there must be an ambiguity somewhere that a court can use to interpret an unambiguous statute any way they want. There are a series of rules against this. *See*, *Vanderborgh* v. *Kruth*, 2016 COA 27. ¶8; *Krol* v. *CF & I Steel*, 2013 COA 32 ¶ 15; C.R.S. § 2-4-101. *See also, Johnston v. City Council of City of Greenwood Village*, 493 P.2d 651, 654 (Colo. 1972); *Charlton v. Kimata*, 815 P.2d 946 (Colo. 1991). A court should ascertain the intent of the General Assembly, by looking first to the statutory language, giving words and phrases their plain and ordinary meanings, giving consistent, harmonious, and sensible effect to all of the statute's language. If after doing this, a court determines that the statute is not ambiguous, the court is to enforce it as written and not resort to other rules of statutory construction. If possible, courts must give effect to every word of the statute.

This is what the lower courts did in this instance, they found no ambiguity in the statute sufficient to justify a reach into legislative history for legislative intent. Knowingly is to be interpreted in it's plain and ordinary meaning.

3. Knowingly means actual knowledge. It would be easy for the Peter and Samuel Stimsons to conclude that the statutory language is drafted in plain words, such that their plain and ordinary meanings are well established, that the use of "knowingly" is not ambiguous, and that it should be enforced as written, and that the mental state of "knowingly" means "actual knowledge." Fortunately, this has already been done for them in the case of *Dickman*, 870

P.2d 1261, as anticipated by *Charlton*, 815 p.2d 946. The Stimsons believe that the duty created or left in place by the statute as a whole, imposes a duty upon them "not to knowingly provide the person under the age of twenty-one a place to consume an alcoholic beverage," and that in the context of their motions for summary judgment, the statute requires Petitioners to show that they have evidence showing facts in the record, that establish that Samuel and Peter Stimson knowingly provided Sieck, the person under the age of twenty-one, a place to consume an alcoholic beverage. These are the duties imposed by C.R.S. § 12-47-801(4)(a)(I) upon Petitioner and Respondents in this case.

Paragraph (a) of subsection (4) of H.B. 05-1183, as applied here, removes any common law duty upon social hosts who furnish any alcoholic beverage to any underage individual for any injury because of the intoxication of any person due to the consumption of such alcohol beverages, except when "(I)t is proven that the social host knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage...." Petitioner seeks to interpret the element of knowingly as meaning knew or should have known. This knew or should have known is a lower standard of proof under the law and is used when the law imposes a duty of inquiry upon someone. This is done through the concept of constructive knowledge. Petitioner is asserting that in this instance "knowingly", has something less than its traditional meaning, and less than the meaning already determined by this court in the same section.

4. The "Wide Open" impunity suggestion.Petitioner's contention that there was a venue open to anyone, of any age, is not supported by the record. It is correct that the Stimsons did not have someone man the red solo cups, the keg of beer, the backyard gates, there were no bouncers, they did not call the police, they did not check everyone's I.D., police were not hired, and they did not kick anyone out of the party. All of these things could be relevant to negligence; they certainly could be relevant to breach of duty, proximate cause, or foreseeability. However, arguing that the Legislature has imposed these negligence conventions, overlooks the fact that negligence no longer controls this arena, especially in light of the fact that the Legislature has not required any of Petitioner's "suggestions". Common law negligence no longer is relevant to social hosts who invite their adult friends over for a party. None of the items on Petitioners list were required by the General Assembly. The General Assembly could have required any or all of these things, potentially. They chose not to. Instead, they chose to authorize civil liability upon those social hosts who knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage.

5. The Bargain. When the General Assembly eliminated all common law causes of action against vendors and social hosts and expressly overruled

Justice Erickson's formulation of a new expansive tort in *Largo Corp. v. Crespin*, 727 P.2d 1098 (Colo. 1986), it also reinstated the common law rule that consumption of alcohol is the proximate cause of injuries inflicted by an intoxicated person. *See, Build It and They Will Drink v. Strauch*, 253 P.3d 301 (Colo. 2011). It is submitted that as the General Assembly slowly added more and more liability back into the Dram Shop Act, a bargain of sorts was struck. This is something that deliberative bodies do, not courts. The General Assembly took away social hosts defenses of contributory or comparative negligence, it took away notions of duty and foreseeability, it eliminated the defense of intervening causes, eliminated the defense of assumption of risk, it took away the relevance of a host's knowledge that guests either were, or were not, about to drive or were planning on driving after drinking, it made the assessment by the host of the degree of intoxication irrelevant, it eliminates standard of care analysis, how much care is reasonably required, is it enough to provide attendees a place to "sleep it off", are cab rides required to be paid by the social host, is the social host required learn how to administer sobriety tests.it made the distinctions over who had the opportunity to see and gauge the state of mind of the guests by blurring the relevance of the determination over who was serving or whether service was simply self-serve, it imposed caps on damages and eliminated the former "willful" mental status from parts of the Dram Shop Act. This is all to suggest a way of thinking that some kind of a bargain or balancing

of competing interests is present or should be present in making these decisions.

Courts should exercise extreme caution before jumping in and finding ambiguity when there is none, for the purpose of expanding liability in the fashion that the Plaintiff entreats this Court to do. *See, McCarty v. Goldstein*, 376 P.2d 691 (Colo. 1962).

Petitioner by inference, suggests that this Court, become an activist Court, take charge, by defining "knowingly", and then applying it in a new and novel way, in two configurations, within just sentences of one another, in the same act. It is certainly within this Court's purview to oblige the Petitioner; however, this Court should show great deference to the General Assembly in this area, especially in light of the Legislature's revisions to the statute *following Largo Corp.*, 727 P.2d 1098.

The Petitioners sole issue, for Certiorari, references a concern that Peter or Samuel Stimson threw a "wide open" party and opened the venue to anyone of any age to drink, indiscriminately on the premises. (Petitioner's Opening Brief, pp.17 and 25.) There is no such finding in the record, and the Stimsons hasten to note that this Court and the Petitioner did not include the modifying language of "knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage...." Petitioner has misstated, or misquoted the content of H.B. 05-1183 C.R.S § 12-47-801(4)(a)(1), by reformulating the Legislation in his brief stating such things as knowingly "provide a place for

underage drinking," where the correct language of the statute states "knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage…" H.B. 05-1183. Petitioner engages in this misquoting three times on page 1, once on page 4, 6, 7, 21, 22, twice again on page 25, once on page 26, 28, 35. Where Petitioner most often takes pains to omit all together the requirement of knowingly and on several occasions Petitioner chooses to formulate his view of how H.B. 05-1183 reads by omitting the language focusing attention on the "the person under the age of twenty-one" as if liability should attach if anyone at the party was underage, regardless of whether that underage person was, or was not, the person who injured an individual or another's property. The General Assembly was clear when they used the descriptor "the person under the age of twenty-one." The general Assembly did not say "any person".

If one looks carefully at Petitioner's argument about ambiguity, it appears that Petitioner is conflating **Legislative intent**, which is to first be determined by reading the plain language of the statute, with, **Legislative history,** that is not considered until there is a need to resolve an ambiguity.

Constructive knowledge has been defined by the courts. "If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact; e.g. matters of public record. *Attoe v. State Farm Mutual Auto. Ins. Co*., 153 N.W.2d 575, 579 (Wis. 1979).

Knowingly has been defined as "With knowledge; consciously; intelligently, willfully; intentionally. Black's Law Dictionary, fifth edition *West Publishing* (1979).

"A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Model Penal Code, § 2.202.

C.R.S. § 18-1-501(6) defines knowingly as follows:

> All offenses defined in this code in which the mental culpability requirement is expressed as "knowingly" or "willfully" are declared to be general intent crimes. A person acts "knowingly" or "willfully" with respect to conduct, or to a circumstance described by a statute defining an offence when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" or "willfully", with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

Here there is no ambiguity, and, thus, no need to resort to Legislative history in search of a Legislative intent, that allows for the disregard of the plain meaning of the statute. We are all aware of the possibility that a rule maker may

mean one thing, but enact something different. Unless there is an absurd result, the plain language and meaning of what is written must be adhered to, until the Legislature later re-drafts it.

Circumstantial Evidence. Much was made of the handful of underage attendees who crashed Mitch Davises Birthday party. None of the hosts knew who they were. Their presence is irrelevant unless the discussion of their ages is used to circumstantially establish that either of the Stimsons knew that Sieck was present, drinking, and that he was under-age. Based on all of the evidence in the record, Petitioner was unable to establish, directly, or circumstantially, that either Stimson actually knew that Sieck was present, drinking, and underage.

Further, Petitioner has at various points argued that "constructive knowledge" can be used in this instance to show that the Stimsons "knew" that Sieck was present at their home, that they knew that he was drinking alcohol at their home, and that they knew that he was underage. There still are no circumstantial facts to establish that the Stimsons knew. This is a case about what the Respondents actually knew.

Constructive notice has also been defined. **"**Such notice as is implied or imputed by law, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing to be notices, as contrasted

with actual notice of such thing." Black's Law Dictionary, fifth edition *West Publishing* (1979).

An instruction on the use of evidence of constructive knowledge has been approved in Colorado Jury Instructions 4th, at instruction CJI-Civ. 4th 3:6 (1999). There it provides that based upon the case of *Colburn v. Gilcrest*, 151 P. 909 (Colo. 1915). That… "You must find that a person knew fact, if (he) (she) had information that would have lead a reasonable person to inquire further and that inquiry would have revealed that fact." The committee comments state that "This instruction is applicable to those situations where the law imposes a duty to inquire." The example given is, "investigating the meaning of a warning signal such as a flashing red light on a road indicating a major road hazard." Petitioner's evidence tendered in response to Respondents' Motions for Summary Judgment did not establish that the Stimson's had a duty imposed by law to inquire, AND Petitioner's tendered evidence was not the type of evidence that would place them on such a level of alert as one investigating the meaning of a warning signal such as a flashing red light on a road indicating a MAJOR ROAD HAZARD. CJI-Civ. 4th 3:6, (1999).

We have already learned in the area of Dram Shop Act Liability that knowingly does not mean "knows or should have known" *See, State ex rel Suthers v. Mandatory Poster Agency, Inc*., 260 P.3d 9 (Colo. App. 2009) and *Build It & They Will Drink Inc.*, 253 P.3d 302; s*ee also, Lombard v. Colo.*

Outdoor Educ. Ctr. Inc., 187 P.3d 565 (Colo 2008). The phrase knew or should have known, is not satisfied by possession of constructive knowledge which is imputed knowledge and is not applicable to the requirement of H.B.05-1183.

The general assembly did not provide a new definition of the word, they used "knowingly," and this Court has informed us in the past that the Legislature is presumed to be aware of prior rulings of our courts, that they intended not to modify prior holdings of the court of appeals or this supreme court, unless clearly intended. Thus the definition of "knowingly" as used in other recent opinions, prior to the 1995 amendments should remain in full force and effect.

"Our understanding that foreseeability is not an element or appropriate consideration under C.R.S. §12-47-801 does not transform the statute into a strict liability statute. Liability under section C.R.S. §12-47-801 turns on proof that the liquor licensee " willfully and knowingly" served a visibly intoxicated person. 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. In addition to the high level of fault required, the cap on liability and the limited period for filing a claim will prevent a landslide of claims against vendors of alcohol beverages." *Dickman v. Jackalope Inc.,* 870 P.2d

1261 (Colo. Ct. App. 1994) was decided in advance of the 2005 amendments, such that our General Assembly was presumed to be aware of such decision in framing the 2005 amendments.

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 Petitioner 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.

Summary judgment was affirmed because the factual record did not provide any indication that Respondents had information to show that Sieck, was underage.

The court of appeals affirmed summary judgment because it found the record did not what the Petitioner claimed it said. 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 had reason to be aware that Sieck was at their party, much less that Sieck was underage and that he was drinking. Again, should the Legislature wish to

prescribe an obligation on the part of social hosts to "card" party attendees man the solo cups, provide guards at the yard gates, lock the front door, they could do so, however they have not yet gone this far

The general assembly has the authority to do so, but has not yet taken that step. It is for the Legislature to enact such requirements, not Petitioners request of this court do it for him.

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.

CONCLUSION

Each of the Stimsons submit that the answer to the question stated in this courts grant of certiorari is "no." The court of appeals did not negate the duty imposed by H.B. 05-1183, Instead, the Court of Appeals gave effect to the "knowingly" modifiers of H.B. 05-1183 and the two lower courts held the Petitioner to the standard that he must respond to motions for summary judgment with evidence, circumstantial or direct, to show that there is a material issue of fact regarding Respondents knowledge that Hank Sieck was underage, and that the Respondents knew that he was there, at their residence, drinking, and that they knew, after Sieck crashed the party that the Respondents were then

providing him a place to consume an alcoholic beverage.

The Court of Appeals properly applied the elements of social host dram shop liability in affirming the Trial Courts summary judgment in Respondents' favor. Respondents seek to recover their costs for this appeal and ask for an award of costs against the Petitioner in this action.

Respectfully submitted this 12th day of January, 2018.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, a true and correct copy of the foregoing ***RESPONDENT SAMUEL STIMSON AND PETER STIMSON'S ANSWER BRIEF*** *was filed and served electronically via the Colorado Court's E-Filing System upon the following:*

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