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Colorado's Supreme Court Provides Clarity on Social Host Liability Under the Dram Shop Act

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For most parents, it is easy to imagine one's college-aged son or daughter making a seemingly innocuous choice, i.e., hosting a party where alcohol is served, without giving much thought to the potential outcomes. For a lawyer, it is similarly easy to imagine the grave consequences that could result from the decision to host such a party. Those worlds came together in *Przekurat v. Torres*, a case arising from a serious car accident that occurred after the underage driver attended a college party where the hosts served alcohol.

In its *Przekurat* opinion, issued September 10, 2018, the Colorado Supreme Court clarified an important issue on social host liability under Colorado's Dram Shop Act, holding that a social host who provides a place to drink alcohol must have actual knowledge that a specific guest is underage to be held liable for any damages caused by that underage guest. In doing so, it rejected a constructive knowledge approach that, if adopted, would have had at least two significant effects: (1) expanding the prospect of liability for social hosts under the Dram Shop Act; and, (2) making it very difficult for social host defendants to obtain pretrial dismissal through a motion.

Clarity on liability under the Dram Shop Act is very important. These cases, like *Przekurat*, often arise from drunk driving and involve catastrophic injuries.

Before further discussing the *Przekurat* opinion, it may be helpful to first review the history of social host liability under the Dram Shop Act and the difference between constructive and actual knowledge under Colorado law. Both are important in understanding the *Przekurat* opinion.

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COLORADO'S DRAM SHOP ACT AND SOCIAL HOST LIABILITY

If the term "dram" is unfamiliar to you, it is a unit of liquid measure used during colonial times.[1] A "dram shop" is a place where liquor is sold by the drink.[2] A "dram shop act is '[a] statute allowing a plaintiff to recover damages from a commercial seller of alcoholic beverages for the plaintiff's injuries caused by a customer's intoxication.'"[3] Most

In 1879, Colorado enacted the original version of its Dram Shop Act, titled "An Act to Suppress Intemperance."[4] This law established a narrow exception to the common law rule that alcohol vendors could not be liable for injuries sustained by third parties.[5] "At common law neither an intoxicated person nor a person injured by an intoxicated person had a remedy against the provider of the alcohol."[6] The underlying rationale for the common law rule was that "the consumption of alcoholic beverages, rather than the provision of it, was the proximate cause" of any injuries suffered.[7] Under the common law at the time, "responsibility was placed entirely on the shoulders of the person who actually consumed the alcohol."[8]

Under the 1879 law, liability was only imposed under extremely limited circumstances, i.e., against a person who: (1) sells or gives alcoholic beverages; (2) to a "habitual drunkard[;]" (3) who consequently becomes intoxicated an injures a third party; (4) provided the defendant has received written or printed notice not to sell or give alcoholic beverages to the habitual drunkard.[9] The scope of this law later expanded in response to Prohibition, e.g., its application was not limited to the provision of alcohol to a "habitual drunkard" and the notice requirement was removed.[10]Over time, the common law evolved as well. As society shifted from

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[1] *See Rivero v. Timblin*, No. CI-09-08267, 2010 WL 2914400, *1 n. 2 (Pa.Com.Pl. March 16, 2010).
[2] *See Snow v. State*, 9 S.W. 306 (Ark. 1888).
[3] *Troxel v. Iguana Cantina, LLC*, 29 A.3d 1038, 1047 (Md.App. 2011), *quoting* Black's Law Dictionary 531 (8th ed. 2007).
[4] *See Largo Corp. v. Crespin*, 727 P.2d 1098, 1106-7 (Colo. 1986).
[5] *See* 7 Colo. Prac., Personal Injury Torts and Insurance § 20:5 (3d ed.).
[6] *Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 305 (Colo. 2011), *citing Lyons v. Nasby*, 770 P.2d 1250, 1253 (Colo. 1989).
[7] *See Sigman v. Seafood Ltd. Partnership I*, 817 P.2d 527 (Colo. 1991)(citations omitted).
[8] *Build It and They Will Drink*, 253 P.3d at 305.
[9] *See Largo Corp.*, 727 P.2d at 1105.
[10] *Id.* at 1106 (citations omitted).

mixing alcohol with horse travel to mixing alcohol with automobile travel, there was an increase in the severity and number of injuries resulting from the shift.[11] This led Colorado courts "to reject the traditional common law rule in order to permit negligence actions against vendors of alcohol."[12]

In comparison to vendor liability, social host liability is a relatively new concept in Colorado. In 1986, the Colorado legislature passed the modern version of the Dram Shop Act which addressed, for the first time, social host liability.[13] Prior to 1986, Colorado had not extended common law negligence claims, which were permitted against alcohol vendors, to social hosts and social hosts faced no liability under the prior version of the Dram Shop Act.

Under the 1986 version of the Dram Shop Act, a social host's liability for damage caused by an intoxicated underage person was limited to situation where a host willfully and knowingly served any alcoholic beverages to the underage person.[14] In 2005, the Colorado legislature amended the Dram Shop Act, eliminating the willfulness requirement and expanding liability to include social hosts who knowingly provided a place for underage drinking.[15]

THE DIFFERENCE BETWEEN ACTUAL KNOWLEDGE AND CONSTRUCTIVE KNOWLEDGE

Actual knowledge is just as it sounds. In the context of a social host, suppose a college student hosts a keg party and checks each guest's driver's license at the door. If any underage guests were permitted to enter and drink at the party, that host has actual knowledge of hosting an underage drinker under the Dram Shop Act and could face liability if any of his underage guests cause injury to someone else.

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[11] *Lyons*, 770 P.2d at 1253-54, *citing Garcia v. Hargrove*, 176 N.W.2d 566, 572 (Wis. 1970)(Hallows, C.J., dissenting), *overruled by Sorensen v. Jarvis*, 350 N.W.2d 108 (Wis. 1984).
[12] *Build It and They Will Drink*, 253 P.3d at 305-6.
[13] *See Charlton v. Kimata*, 815 P.2d 946, 948 (Colo.App. 1991)(citations omitted).
[14] *Charlton,* 815 P.2d at 948-949, *quoting* C.R.S. § 12-47-128.5(4)(a)(1)(I)-(II).
[15] *See Przekurat v. Torres*, 2018 CO 69, ¶ 9, *quoting* C.R.S. § 12-47-801(4)(a).

Constructive knowledge means "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."[16] In other words, a person may be deemed to have had notice "if in the exercise of ordinary diligence they should have known of it[.]"[17] Whether a person has constructive knowledge depends on the facts and circumstances of the case and typically is a question of fact for the jury.[18]

Let us return to our college student party host example. Suppose the student opens the front door and finds his younger brother, who the student knows to be sixteen years old, and several of his brother's friends. The student does not actually know how old his brother's friends are but knows that all of them are sophomores in high school. In this example, the student host would have constructive knowledge that his brother's friends are underage, even if he does not know their actual ages.

SUMMARY OF *PRZEKURAT*

In June of 2011, some roommates threw a party at a house they were renting in Boulder, Colorado, to celebrate one roommate's birthday and another's college graduation.[19] Between 20 and 120 guests attended the party throughout the evening.[20] Not all who attended had been invited by the hosts.[21] The hosts provided alcohol, and some guests may have brought their own.[22]

Jared Przekurat and Hank Sieck attended the party with Victor Mejia, who had heard about it through a friend, Robert Fix.[23] Fix knew the hosts and had helped plan the party.[24] Sieck was twenty years old at the time.[25]

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[16] *Full Moon Saloon, Inc. v. City of Loveland*, 111 P.3d 568, 570 (Colo.App. 2005), *quoting Black's Law Dictionary* 876 (7th ed. 1999).
[17] *Morgan v. Board of Water Works of Pueblo*, 837 P.2d 300, 303 (Colo.App. 1992), *citing Higgins v. City of Boulder*, 98 P.2d 996 (Colo. 1940).
[18] *See, e.g., Elston v. Union Pacific R. Co.*, 74 P.3d 478, 483 (Colo.App. 2003)(citations omitted); *see also Morgan*, 837 P.2d at 303.
[19] *Przekurat*, 2018 CO 69, ¶ 2.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at ¶ 3
[24] *Id.*

None of the hosts knew Sieck before the night of the party.[26] At the party, one of the hosts had a brief encounter with Mejia and the others, saying to Mejia: "I don't really know these other people, but I know you."[27] Sieck did not recall this encounter and there was no evidence that any of the hosts were aware that Sieck was underage.[28]

Sieck drank at the party and he, Mejia, and Przekurat left the party in Przekurat's car at 2:00 a.m.[29] Sieck, who was "highly intoxicated[,]" drove and ultimately lost control of the car, causing it to roll several times.[30] Przekurat was thrown from the vehicle and suffered catastrophic injuries.[31]

Przekurat's father sued the hosts on behalf of his son, alleging that they knowingly provided a place for Sieck to drink alcohol and, accordingly, should be liable under the Dram Shop Act.[32] The hosts moved for summary judgment on the ground that there was no evidence to show that any of them actually knew Sieck was drinking at the party or that he was underage.[33] In response to the motion, Przekurat's father argued that constructive knowledge was sufficient to establish social host liability under the Dram Shop Act.[34] He argued that because the hosts provided alcohol without restriction and there were many underage drinkers at the party, there was sufficient evidence of constructive knowledge.[35]

The trial court agreed with the hosts, finding that a social host must actually know that a person is underage in order to impose liability under the Dram Shop Act.[36]

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at ¶ 4.
[30] *Przekurat v. Torres*, ---P.3d ---, 2016 COA 177, ¶ 2, 2016 WL 7009134 (Colo.App. 2016); *see also Przekurat*, 2018 CO 69, ¶ 4.
[31] *See Przekurat*, 2018 CO 69, ¶ 4.
[32] *Id.* at ¶ 5. After suing the hosts, Przekurat's father filed an amended complaint with claims against Fix. *See Przekurat*, 2016 COA 177, ¶ 45. Przekurat's father later settled with Fix. *Id.* at ¶ 47.
[33] *See Przekurat*, 2018 CO 69, ¶ 5.
[34] *Id.*
[35] *Id.*
[36] *Id.*

The trial court also found that there was no evidence that any of the hosts actually knew of Sieck's presence at the party or his age.[37] The trial court granted the hosts' motion and dismissed the case.

Przekurat's father appealed the trial court's ruling.[38] A division of the Colorado Court of Appeals agreed with the trial court, finding "that the language of the Dram Shop Act clearly and unambiguously requires that a social host must have actual knowledge that a person is underage in order to impose liability for that person's actions."[39]

Przekurat's father then petitioned the Colorado Supreme Court, asking it to determine whether the Dram Shop Act "requires that a social host have actual knowledge of a person's underage status, or whether constructive knowledge is sufficient to impose liability."[40] The Colorado Supreme Court agreed to consider the issue and ultimately affirmed the prior rulings, concluding "that the plain language of the Dram Shop Act requires actual knowledge[.]"[41]

In reaching this conclusion, the Colorado Supreme Court relied on established rules of statutory interpretation.[42] Under these rules, a reviewing court's duty is to give effect to the legislature's intent. To do so, a reviewing court first looks at the statute's plain language to ascertain its meaning.[43] If the language is clear, the statute is applied as written.[44]

After reviewing the Dram Shop Act and its history, the Colorado Supreme Court held that the term "knowingly" requires actual knowledge, rejecting the constructive knowledge approach urged by Przekurat's father.[45] In doing so, it noted that Przekurat's father "has been unable to point to any other situation in which we have construed the word 'knowingly'–standing alone—to allow for

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[37] *Id.*
[38] *Id.* at ¶ 6.
[39] *Id.*; *see also Przekurat*, 2016 COA 177, ¶ 28.
[40] *See Przekurat*, 2018 CO 69, ¶ 7.
[41] *Id.*
[42] *Id.* at ¶ 8.
[43] *Id.* at ¶ 9, *citing Build It and They Will Drink*, 253 P.3d at 304-5.
[44] *Id.* at ¶ 9, *citing Clyncke v. Waneka*, 157 P.3d 1072, 1077 (Colo. 2007).
[45] *Id.* at ¶¶ 15-18.

constructive knowledge."[46] The Colorado Supreme Court also noted that its interpretation was "consistent with prior decisions in which the word 'knowingly' has been interpreted in other sections of the Dram Shop Act to require actual knowledge."[47]

CONCLUSION

Had the Colorado Supreme Court adopted a constructive knowledge approach, it would have significantly changed the nature of social host liability under Colorado law.

First, social hosts would not only face liability for their actual knowledge, but for what they should have known based on the circumstances. This would effectively impose a negligence standard on social hosts. Defense of a lawsuit for social host liability would change. Instead of a focus on the facts, i.e., what happened, the focus would expand both to what happened and what should have happened. "What should have happened" is, of course, a more subjective standard and would almost certainly change the nature of social host litigation from fact-driven to expert-driven.

Second, had the Colorado Supreme Court adopted a constructive knowledge approach, it would have made it very difficult for social host defendants to obtain dismissal of the case before trial. Skilled plaintiff attorneys would have little difficulty creating a factual dispute based on what a social host knew or should have known. With reduced chances of prevailing on a pretrial motion to dismiss, litigation expenses, including attorney fees would increase and pretrial settlement would be more difficult.

In any legal dispute, clarity is better than ambiguity. When the law is clear, evaluating a case becomes a matter of applying the facts to the law. This is good for the litigants and good for the justice system. Ambiguity in the law leads to uncertainty and uncertainty leads to delay. When neither side's counsel can provide a probable range of outcomes due to uncertainty in the law, cases take

[46] *Id.* at ¶ 15.
[47] *Id.* at ¶ 16, *citing Build It and They Will Drink*, 253 P.3d at 304.

longer to resolve and may require trial. What the Colorado Supreme Court has done in *Przekurat* is lend some clarity to an important issue, i.e., the circumstances under which a social host faces liability under Colorado's Dram Shop Act. Those facing this issue in the future can now look to the Dram Shop Act as it was written and rely on it to evaluate whether or not there may be social host liability. This is a good thing.

If you have any questions regarding Colorado's Dram Shop Act or if you would like to discuss an issue related to civil litigation in Colorado, please do not hesitate to contact me or any of my colleagues at Proctor Brant, P.C.