IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

FAIEZ ENNABE, individually and as Administrator, etc. et al.,

Plaintiffs and Appellants,

v.

CARLOS MANOSA et al.,

Defendants and Respondents.

Supreme Court Case No. S189577

Court of Appeal, Second Appellate District, Division One
Case Number B222784
Superior Court of the State of California for the County of Los Angeles
Case Number KC053945
The Honorable Robert A. Dukes, Judge

OPENING BRIEF ON THE MERITS

Abdalla J. Innabi (S.B. No. 172302)
Amer Innabi (S.B. No. 225413)
Innabi Law Group, APC
2500 E. Colorado Blvd., Suite 230
Pasadena, CA 91107
Tel: (626) 395-9555
Fax: (626) 395-9444

Attorneys for Plaintiffs and Appellants, FAIEZ and CHRISTINA ENNABE, individually and Administrators of the ESTATE OF ANDREW ENNABE

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

FAIEZ ENNABE, individually and as Administrator, etc. et al., Plaintiffs and Appellants, v. CARLOS MANOSA et al., Defendants and Respondents.	Supreme Court Case No. S189577

Court of Appeal, Second Appellate District, Division One
Case Number B222784
Superior Court of the State of California for the County of Los Angeles
Case Number KC053945
The Honorable Robert A. Dukes, Judge

OPENING BRIEF ON THE MERITS

Abdalla J. Innabi (S.B. No. 172302)
Amer Innabi (S.B. No. 225413)
Innabi Law Group, APC
2500 E. Colorado Blvd., Suite 230
Pasadena, CA 91107
Tel: (626) 395-9555
Fax: (626) 395-9444

Attorneys for Plaintiffs and Appellants, FAIEZ and CHRISTINA ENNABE, individually and Administrators of the ESTATE OF ANDREW ENNABE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATE

FEDERAL

OUT-OF-STATE

STATUTES

STATE

FEDERAL

CONSTITUTIONS

STATE

FEDERAL

OTHER SOURCES

I. ISSUES PRESENTED

This case presents the following issues as framed by this Court:

1. Is a person who hosts a party at a residence, and who furnishes alcoholic beverages and charges an admission fee to uninvited guests, a "social host" within the meaning of Civil Code section 1714, subdivision (c), and hence immune from civil liability for furnishing alcoholic beverages?
2. Under the circumstances here, does such a person fall within the exception stated by Business and Professions Code section 25602.1 to the ordinary immunity from civil liability for furnishing alcoholic beverages provided by Business and Professions Code section 25602, subdivision (b)?

Based upon the stated intent of the legislature and the plain language of the applicable laws of this state, the answers to the above issues are: 1) no and 2) yes.

II. INTRODUCTION

The issues raised in the instant matter are important to defining the legal parameters of the "social host" immunity created by Civil Code section 1714, subdivision (c) and the factual circumstances when that immunity and the immunity created by Business and Professions ("B&P") Code section 25602, subdivision (b) should yield to civil liability under B&P Code section 25602.1. Based on the language, history, and purpose of these statutes and all applicable authority contained within California's Alcoholic Beverage Control Act of 1935 ("ABC Act"), this Court must find that when a person furnishes alcoholic beverages and charges an admission fee to uninvited minor guests that person is not immune from civil liability for furnishing alcoholic beverages and can be held liable under B&P Code section 25602.1.

III. PROCEDURAL HISTORY

In July 2009, Plaintiffs and Appellants, Faiez and Christina Ennabe, individually and on behalf of the Estate of Andrew Ennabe ("plaintiffs") filed a

First Amended Complaint against Defendants and Respondents Carlos, Mary and Jessica Manosa ("defendants") for the wrongful death of their 19 year old son, Andrew Ennabe ("decedent"). [1AA 001-006.] Plaintiffs asserted three separate causes of action based on: 1) general negligence, 2) premises liability, and 3) B&P Code section 25602.1. [1AA 011-016.]

In September 2009, defendants answered the amended complaint and filed a motion for summary judgment or, in the alternative, a motion for summary adjudication on the basis that: 1) defendants did not owe a duty to plaintiffs to protect decedent from harm, 2) there is no causation between any acts or omissions of defendants and the death of the decedent, and 3) B&P Code section 25602.1 is inapplicable under the circumstances. [1AA 020, 025-050.] Despite the parties asserting numerous evidentiary objections, the trial court overruled every objection and granted defendants' motion for summary judgment in its entirety on January 12, 2010. [2AA 487-496.] Judgment was eventually entered by the trial court on February 19, 2010. [2AA 497-501.]

Plaintiffs subsequently filed a Notice of Appeal for this matter on March 1, 2010. [2AA 497-501.] Following oral argument on November 15, 2010, the Court of Appeal filed its published opinion on December 1, 2010, affirming summary judgment in favor of Defendant Jessica Manosa.[1] Plaintiffs subsequently filed a Petition for Rehearing on December 10, 2010, which was denied with modification on December 20, 2010.

Consequently, plaintiffs filed a Petition for Review with the Supreme Court of California on January 7, 2011. Ultimately, the Supreme Court granted plaintiffs' Petition for Review on March 23, 2011.

---

[1] Plaintiffs have not and do not challenge the propriety of the lower courts' rulings as to Defendants Carlos and Mary Manosa. The instant appeal only relates to the ruling for Defendant Jessica Manosa.

IV. STATEMENT OF FACTS

On the evening of April 27, 2007, Defendant Jessica Manosa ("defendant"), the then, 20 year old daughter of Defendants Carlos and Mary Manosa, hosted a house party open to the public at a vacant and unfurnished rental property owned, maintained and/or controlled by each of them in Diamond Bar, California. [1AA 014-016, 2AA 328:10-23.]

Defendant, along with her friends, Cross-defendants Marcello Aquino and Mario Aparicio ("cross-defendants"), invited mutual friends to her party. [2AA 331:22-332:1, 344:2-14, 371:11-372:24, 373:13-25, 377.] Despite defendant's claim that she invited only a few close friends (allegedly fewer than 15), the party attracted approximately 60 people. [2AA 331:22-332:1, 344:2-14, 371:11-372:24, 377.] ***The vast majority of the people who attended the party were under the age of 21 years***, and approximately one-third of those admitted into the party were unknown and uninvited by defendant. [2AA 312:22-25, 332:10-17.]

On the evening of the party, ***unknown and uninvited guests who arrived at the residence were charged a $3 to $5 admission fee to enter the party and drink alcohol already purchased by defendant***. [2AA 332:22-333:12, 334:17-335:16, 343:2-6, 350:17-22, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.] Specifically, defendant directed a friend of Cross-defendant Aquino, Todd Brown, to serve as a "bouncer" at the side gate of the residence and charge unfamiliar guests as they approached the premises. [2AA 332:22-333:12, 334:17-335:16, 343:2-6, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.] Defendant does not contest that an admission fee was charged to uninvited guests on the evening of the incident. [See Respondent's Brief from Court of Appeal at p. 4] In fact, unknown and uninvited guests were specifically told by Brown that payment allowed them entry into the party and unlimited access to any alcohol contained on the property. [2AA 332:22-333:12, 334:17-335:16, 343:2-6, 351:22-352:13, 353:4-11, 354:5-

13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.] Invited guests were admitted without charge into the party.

Central to defendant's party was the presentation and consumption of alcohol. [2AA 310:18-311:10] The alcohol, several cases of beer, at least three to four bottles of tequila and rum, a large cooler of "jungle juice,"[2] cups, and mixers were provided at the party without limitation by defendant to all guests in a communal setting. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 380-382.] With the exception of mixers, ice, and plastic cups which were provided by the defendant, ***alcohol was the only consumable item made available by defendant to admitted guests***. [2AA 308:21-25, 309:1-12, 310:18-25, 311:1-17.] ***Other than the alcohol purchased by defendant no other alcohol was brought onto the premises by any guest in attendance at the party.*** [2AA 318:13-15.]

Defendant testified that she purchased the alcohol at the party by providing approximately $60.00 towards the purchase of alcohol for the party. [1AA 139 and 2AA 295:9-10, 308:5-310:17, 312, 313:9-24, 315:9-316:11, 318:13-15.] ***Both cross-defendants denied purchasing or supplying any alcohol for defendant's party***. [2AA 350:9-22, 373:2-8.] In the end, defendant clearly understood that she was the host of the party and it was entirely "her own idea." [2AA 303:17-19, 321:5-7, 370:10-16.]

Some time during the party, David Ennabe, the younger brother of Andrew Ennabe, the decedent in this matter, personally observed and heard defendant tell Cross-defendant Aparicio and Stephen Filaos, another invited guest, to purchase additional alcohol for the party and to obtain ***some*** funds for the additional alcohol from the admission fees collected by Brown at the side gate of the house. [2AA 402-404.] Despite defendant not recalling whether an additional alcohol run was made during the party, Hani Abuershaid, the brother of defendant's boyfriend,

---

2 "Jungle juice" is a mixture of various forms of hard alcohol and fruit juice.

specifically heard Filaos tell Brown and Cross-defendant Aquino that, "Jessica told me to get money from you to get more alcohol." [2AA 345:1-7, 346:5-347:6.] Moreover, Abuershaid stated he saw Filaos take ***some*** money from Brown for the purpose of purchasing additional alcohol for the party and leave with Cross-defendant Aparicio for the store. [2AA 345:1-7, 346:5-347:6.] Approximately 30 minutes later David Ennabe observed the additional alcohol being brought onto the premises by Cross-defendant Aparicio and Filaos. [2AA 402-404.]

During the course of the party, two underage[3] guests, Thomas Garcia and Andrew Ennabe, the decedent, arrived obviously intoxicated but were nonetheless admitted into the party and provided with additional alcohol supplied by defendant. [1AA 056, 139 and 2AA 308:5-309:12, 312-313:3, 313:9-24, 315:9-316:11, 317:2-17, 318:13-15, 320:9-24, 336:2-338:14, 340:10-15, 357:15-24, 358:5-21, 359:1-19, 360:9-25, 364:19-22, 380-382, 387, 389-391, 402-404.] Garcia, an unknown and uninvited guest, was admitted into the party and given unlimited access to alcohol only after paying an admission fee of $20.00 on behalf of himself and his friends. [2AA 318:13-15, 336:2-9, 362:19-363:4, 387.]

Upon his arrival, Garcia appeared to be clearly intoxicated and belligerent to several witnesses based upon his outward appearance and actions. Witnesses Abuershaid, Mike Bosley, a childhood acquaintance of Garcia and uninvited guest at defendant's party, David Ennabe and both cross-defendants observed Garcia display behavior that led them to believe that Garcia was already intoxicated from either consuming alcohol and/or smoking marijuana. According to these witnesses, Garcia had slurred speech, impaired faculties, poor muscular coordination, and acted in a rowdy and belligerent manner. [2AA 336:2-338:14, 389-391, 402-404, 415-421.] Additionally, Garcia admitted during his deposition that he had consumed what he believed to be approximately four shots of whiskey

---

[3] "Underage" or "minor" shall mean persons under the age of 21 years of age.

prior to his arrival at defendant's party. [2AA 358:5-21, 359:1-19, 360:9-25, 364:19-22.]

With regard to decedent, an invited guest of defendant, it was known to defendant, Bosley, and David Ennabe that he arrived at defendant's party from another party where he had already become intoxicated from drinking alcohol. [2AA 320:9-321:1, 389-391, 402-404.]

While on the premises, decedent and Garcia consumed additional amounts of alcohol provided by defendant. David Ennabe observed decedent drink alcohol supplied by the defendant during the party. [2AA 320:9-321:1, 389-391, 402-404.] With regard to Garcia, Abuershaid observed him drink what appeared to be a beer taken from defendants' refrigerator. [2AA 330:12-24, 340:10-15, 341:1-18.] Bosley spoke to Garcia during the party and saw him drink tequila and mixed alcoholic beverages made available at the party. [2AA 389-391.] This additional alcohol caused Garcia to become overly belligerent with others partygoers. [2AA 415-421.] In fact, Garcia was so intoxicated that he was seen dropping his pants several times while dancing, soliciting sex, and aggressively "hitting on" females at the party. [2AA 340:10-25, 341:21-342:11, 415-421.] As a result of his inappropriate behavior and increased intoxication, Garcia was asked to leave the party and was escorted off the premises to his vehicle. Once in his vehicle, Garcia drove away and struck decedent who was near the front portion of defendants' property.[4] Decedent's own alcohol consumption caused his faculties, including his judgment, perception, coordination, balance and reflexes to become significantly impaired. [2AA 415-421.] As such, decedent was unable to perceive and avoid the oncoming vehicle being driven by Garcia who was also under the influence of alcohol. [2AA 320:9-321:1, 330:12-24, 340:10-15, 341:1-18, 340:10-

[4] Garcia stated during his criminal sentencing hearing that "it was not [his] intention to hit [the Ennabe's] son..." and that he "really had no recollection of what happened that night." [2AA 432-434, 415-421.]

25, 341:21-342:11, 389-391, 402-404, 415-421.] As a result of this incident, decedent sustained fatal injuries and died approximately one week later.

V. ARGUMENT

A. STANDARD OF REVIEW

On appeal after a motion for summary judgment has been granted, the appellate court reviews the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) A trial court presented with timely evidentiary objections in proper form must expressly rule on the individual objections, and it if does not, the objections are deemed waived pursuant to Code of Civil Procedure section 437c, subdivision (d), and the objected-to evidence is included in the record for purposes of appellate review. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 578.)

Under California's traditional rules, the appellate court determines with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiffs' case, or has demonstrated that under no hypothesis is there a material issue of fact which requires the process of trial, such that the defendant is entitled to judgment as a matter of law. (*Id.*) In practical effect, the appellate court assumes the role of a trial court and applies the same rules and standards that govern a trial court's determination of a motion for summary judgment. (*Kelly v. First Astri Corp.* (1999) 72 Cal.App.4th 462, 470.)

Because a summary judgment denies the adverse party a trial, it should be granted with caution. (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 409.) Declarations of the defendants are strictly construed, those of the appellants are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the plaintiffs. (*Id.*) The court focuses on

issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence or in inferences reasonably deducible from the evidence, which raise a triable issue of material fact. (*Id.*) Ultimately, the reviewing court must view the record in a light most favorable to plaintiffs and assume as true plaintiffs' version of all disputed facts presented in opposition to the summary judgment motion. (*Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1128.) Under this standard of review, summary judgment should have been denied.

B. DEFENDANT WAS NOT A "SOCIAL HOST" WITHIN THE MEANING OF CIVIL CODE SECTION 1714, SUBDIVISION (C) ON THE EVENING OF THE INCIDENT WHEN SHE CHARGED UNINVITED GUESTS AN ADMISSION FEE FOR ENTRY INTO HER PARTY AND ALCOHOLIC BEVERAGES SHE HAD ALREADY PURCHASED FOR THEIR CONSUMPTION.

1. Defendant Was Not a "Social Host" Based on its Ordinary and Plain Meaning.

Generally, when a court attempts to discern the meaning of a statute, "it is well settled that [a court] must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) "If the statutory language is clear and unambiguous [the court's] inquiry ends. 'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' In reading statutes, we are mindful that words are to be given their plain and commonsense meaning." (*Id.*)

Civil Code section 1714, subdivision (c) specifically provides, "No ***social host*** who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages." (Civ. Code § 1714, subd. (c) (emphasis added).) However, it is the clear intent of the legislature that "***the act of selling alcohol to obviously***

intoxicated minors for commercial gain should be sufficient basis for imposing liability." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.) (emphasis added).)

Civil Code section 1714, subdivision (c) specifically immunizes "social hosts" from civil liability without defining the terms "social host." Based on a plain reading of Civil Code section 1714, subdivision (c), the legislature specifically intended that "social hosts" be the only class of persons civilly immunized from liability under the law.

In determining the plain meaning of "social host," the individual terms, "social" and "host" must be interpreted in conjunction with one another. According to Merriam-Webster's Dictionary, the term "social" is "marked by or passed in pleasant companionship with ***one's friends or associates***." (See www.merriam-webster.com (emphasis added).) Moreover, something that is "social" relates to "human society, the interaction of the individual and the group, or the welfare of human beings as members of society." (*Id.*) A "host" is defined as one that "receives or entertains guests socially, commercially or officially." "Host" also means "one that provides facilities for an event or function." (*Id.*) "Commercial" is defined as "occupied with or engaged in commerce or work intended for commerce" or "viewed with regard to profit." (*Id.*)

Taking into consideration the terms "social host" in conjunction, it can only be interpreted that the legislature intended to protect solely those "hosts" who "receive or entertain friends and associates for pleasant companionship." Consequently, it can safely be inferred that commercial hosts, those who "provide facilities for an event or function" while "occupied or engaged in commerce" or acting "with a regard to profit," would be left unprotected by Civil Code section 1714, subdivision (c).

Based on the plain meaning of "social host," defendant was not a "social host" within the meaning Civil Code section 1714, subdivision (c) under the facts. Generally speaking, a "social" host would not arrange for a "bouncer," open their

residence to individuals ***unknown to them*** (i.e. people who are not friends or associates), and then allow them to remain on the property. More importantly, a "social" host who only seeks "pleasant companionship" would not ***require*** those same unknown and uninvited guests to ***pay an admission fee*** to enter their residence and consume their food and drink, in this case ***alcohol which defendant already purchased***, unless they were "engaged in commerce" or "with a regard to profit."

Here, defendant opened a vacant and unfurnished residence to unknown and uninvited guests and "sold" or "caused to be sold any alcoholic beverages" to them through a "bouncer" who charged an admission fee she required for her own commercial gain. [2AA 328:10-23, 332:22-333:12, 334:17-335:16, 343:4-6, 345:1-7, 346:13-347:6, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.] (See section V.C.4 below for a detailed analysis of the meaning of "sale" and "caused to be sold.") With the exception of mixers, ice, and plastic cups provided by defendant, ***alcohol was the only consumable item made available by defendant to admitted guests***. [2AA 308:21-25, 309:1-12, 310:18-25, 311:1-17.] Based on the foregoing, defendant is not a "social host" within the plain meaning of Civil Code section 1714, subdivision (c) under the circumstances because she provided alcohol to unknown guests for a fee.

2. Defendant Was Not a "Social Host" Because She Committed Affirmative Acts which Necessitated the Acquisition of a Liquor License for Her Party.

The purpose of Civil Code section 1714, subdivision (c) will be advanced if this Court determines that this defendant was not a "social host" on the evening of the subject incident. Presumably, the legislature created the "social host" immunity in enacting Civil Code section 1714, subdivision (c) because it felt the State should not interfere in the private activities and events of its citizens involving alcohol consumption which would otherwise be legal at one's home. However, when certain activities and events are illegal because the permission of

the State has not been obtained (i.e. acquiring a liquor license), the State through its inherent police powers may regulate those activities or events it deems harmful to the public welfare of its citizens and determine when the "social host" immunity yields to civil liability in a given situation.

The Tenth Amendment to the United States Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (United States Constitution, Tenth Amendment.) The States traditionally have had great latitude under their police powers to legislate as "'to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756; *Slaughter-House Cases* (1873) 83 U.S. 36, 62, quoting *Thorpe v. Rutland & Burlington R. Co.* (1855) 27 Vt. 140, 149.)

B&P Code section 23000 et seq., also known as the Alcoholic Beverage Control Act of 1935, governs the manufacture, sale, and disposition of alcoholic beverages within the State of California. (Bus. & Prof. Code § 23000 et seq.) The constitutionality of the ABC Act as a valid exercise of the police power has been established beyond question. (*Tokaji v. State Board of Equalization* (1937) 20 Cal.App.2d 612; *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672; *Schaub's, Inc. v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 858, 869; *Sibert v. Department Alcoholic Beverage Control* (1959) 169 Cal.App.2d 563, 565.)

The State, through the Department of Alcoholic Beverage Control ("ABC"), has the exclusive power to license and regulate the manufacture, importation, and sale of alcoholic beverages in the State of California. Pursuant to B&P Code section 23001, the ABC Act is intended to be an exercise of the police powers of the State for the ***protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages***. (Bus.

& Prof. Code § 23001 (emphasis added).) The primary purpose of this Act requires the highest degree of economic, social, and moral well-being and safety of the State and all its people. (Bus. & Prof. Code § 23001.) When analyzing the ABC Act, ***all provisions*** of the ABC Act ***must be liberally construed*** for the accomplishment of these purposes. (Bus. & Prof. Code § 23001 (emphasis added).)

Under California's Constitution, ***no person shall sell, furnish, give, or cause to be sold*** any alcoholic beverage to any person under the age of 21 years, and ***no person*** under the age of 21 years shall purchase any alcoholic beverage. (California Constitution, article XX, section 22 (emphasis added).) The California Constitution makes it unlawful for ***any person*** other than a licensee of the ABC to sell alcoholic beverages within the State of California. (California Constitution, article XX, section 22.) Similarly, B&P Code section 23300 provides "***no person*** shall exercise the privilege or perform any act which a licensee[5] may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to [the ABC Act]." (Bus. & Prof. Code § 23300 (emphasis added).)

Under the ABC Act, specifically B&P Code section 23399.1, "No license or permit shall be required for the serving and otherwise disposing of alcoholic beverages where ***all*** of the following conditions prevail:

1. That there is ***no sale*** of an alcoholic beverage.

2. That the ***premises are not open to the general public*** during the time alcoholic beverages are served, consumed or otherwise disposed of.

3. That the premises are not maintained for the purpose of keeping, serving, consuming or otherwise disposing of alcoholic beverages." (See Bus. & Prof. Code § 23399.1 (emphasis added).)

---

[5] B&P Code section 23009 defines a "licensee" to mean "any person holding a license, a permit, a certification, or any other authorization issued by the department." (Bus. & Prof. Code § 23009.)

In sum, the defendant in this action was not a "social host" within the meaning of Civil Code section 1714, subdivision (c) because she illegally furnished and sold alcoholic beverages on her premises without obtaining a liquor license when one was required for the type of event she held on the evening of the incident. First, defendant "sold" or "caused alcoholic beverages to be sold." (See Sections V.C.1 to 4 for further discussion.) Second, the "premises were open to the general public at the time alcoholic beverages were served, consumed or otherwise disposed of." (See Section V.C.5 for further discussion.)

3. Defendant Did Not "Pool" Money with Others to Create a "Common Fund" to Purchase Alcohol.

The Court of Appeal erroneously reached the conclusion that the defendant in the instant matter was a "social host" on the evening of the subject incident by comparing the instant matter to *Bennett v. Letterly* (1977) 74 Cal.App.3d 901, a case it incorrectly characterized as the "only other case in California addressing the issue of liability of a minor host where money is pooled to purchase alcoholic beverages for a party." (See *Ennabe v. Manosa* (2010) 190 Cal.App.4th 707, 717.) The Court of Appeal ultimately reached the conclusion that defendant was a "social host" because it felt that the instant matter was a situation where money was "pooled" into a "common fund" by a close group of friends who decided to purchase alcohol for their own social consumption. In *Bennett*, Defendant Letterly, a high school student and a member of its varsity basketball team invited a small group of his classmates (a total of five people) to his home which included John Howell, Carlos "Charlie" Baca, Steve Alvarez, Wayne Houchins, and his date. Although the defendant had been instructed to stay at home by his parents, who were away for the holidays, defendant told his classmates that they were welcome to come to his house following a junior varsity basketball game later that evening. Howell and Baca arrived at defendant's home in a car belonging to Howell's parents and driven by Howell. After a short time had elapsed, ***the close group of classmates decided that they should attempt to procure some alcoholic***

beverages. Though it is unclear exactly how many of those present contributed money toward the purchase of the alcohol, and how much was ultimately collected, it is clear that defendant contributed somewhere between $2 and $5 and that Howell contributed $5. Thereafter, Howell, Alvarez and Baca left defendant's home for the purpose of purchasing the desired alcohol. During the course of their trip the trio was able to procure alcohol and proceeded to consume an entire bottle of whiskey. Unfortunately, while returning to defendant's home, Howell lost control of the car and the car struck the plaintiff, causing him personal injury.

Ultimately, the *Bennett* court affirmed the decision to grant summary judgment in favor of the defendant minor host, one of three purchasers of alcohol. The court held that defendant's conduct did not constitute a "furnishing" of an alcoholic beverage to a minor in violation of Cal. Bus. & Prof. Code § 25658, subdivision (a).[6] (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905.) The court reasoned that "the word 'furnish' implies some type of affirmative action on the part of the furnisher..." (*Id.*) The Court concluded that defendant did no more than contribute $2 to $5 to a common fund intended to be used for the purchase of liquor. He did not himself purchase or control the liquor. (*Id.*)

Unlike *Bennett*, the record clearly indicates that defendant's two friends (Cross-defendants Aparicio and Aquino) did not contribute any money or purchase any alcohol for defendant or her party. [2AA 350:9-22, 373:2-8.] Moreover, contrary to the facts identified in Court of Appeal's opinion, defendant admits no other alcohol was brought onto the premises by anyone else in attendance of her party. [2AA 318:13-15.] (See *Ennabe v. Manosa* (2010) 190 Cal.App.4th 707, 717.) In fact, Cross-defendant Aquino stated the alcohol was present when he first arrived at defendant's party. [2AA 350:20-22.] Therefore, if defendant's two

---

[6] B&P Code section 25658, subdivision (a) provides, "Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." (Bus. & Prof. Code § 25658, subd. (a).)

other friends did not contribute any money towards the purchase of alcohol and no other alcohol was brought onto premises it would logically flow that defendant was the sole source of alcohol on the day of the incident and did not "pool" any money.

Moreover, unlike the *Bennett* participants, defendant and the unknown and uninvited guests admitted onto the property ***never decided*** to enter into a mutual arrangement where money would be "pooled" into a "common fund" to purchase alcohol. As the facts clearly show, unknown and uninvited guests who approached the door were greeted by Brown, defendant's "bouncer," who advised them that they may gain entry and drink alcohol already at the party if they paid an admission fee for defendant. [2AA 332:22-333:12, 334:17-335:16, 343:2-6, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 387, 389-391, 402-404.] The admission fee in the instant matter was not discretionary (i.e., a donation) but mandatory condition precedent to enter defendant's premises and drink the alcohol defendant had ***already*** purchased.

Contrary to the reasoning in the Court of Appeal's opinion in the instant matter, there is no evidence that the unknown and uninvited guests were ever aware that ***some*** of the money from the cover charges collected by defendant's bouncer was used to purchase additional alcohol later in the evening. Given that defendant did not know or communicate with these unknown individuals, including Garcia, it would be impossible for defendant and individuals like Garcia to decide to enter into a mutual arrangement (i.e. a common fund) such as the one described in the Court of Appeal's opinion unless there was some prior understanding that the money would be used for the purchase of additional alcohol. Regrettably, the Court of Appeal in the instant matter somehow made the illogical leap that when a close group of five classmates get together and mutually agree to pool money for the purchase of alcohol for their own social consumption, such as the case is in *Bennett,* that is the same situation as a host requiring at least ***20 strangers*** pay an admission fee to drink alcohol already purchased by the host,

such as the case in the instant matter. On the very face of these facts the *Bennett* case is distinguishable and inapplicable to the instant matter.

Even if this Court were to conclude that the instant matter is a "pooling" case, civil liability has been established where a minor host has created a "common fund" for the purchase of alcohol. The more recent and applicable case of *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, supports the position that civil liability may be imposed on a minor host where money is "pooled" to purchase alcoholic beverages for a Halloween party. In *Sagadin*, a driver and passenger of a motor vehicle filed a civil action based on a violation of B&P Code section 25658 for damages arising from a single vehicle accident against a minor host and his parents, the homeowners. The party in *Sagadin* had approximately 65 people in attendance at the minor's home. ***The minor host contributed money to a common fund*** for the purchase of two half kegs of beer ***prior to and during the course of his party*** to be poured from his father's home beer dispenser. (*Id.* at 1157-1158.) Prior to the party the minor asked his father if he could use his father's beer keg, tap, and dispensing hose for the event. The father stated that the minor was forbidden from using his tap and dispensing hose but that if he did he was required to refill the existing keg. Ultimately, the court concluded ***the minor host and his father, who was not present during the party, "furnished" alcohol to minors and were civilly liable*** based upon their affirmative actions. In reaching its conclusion, the court held that ***a host need not pour any alcoholic drinks*** to have "furnished" alcohol if that person has taken some affirmative step to supply it to the drinker. (*Id.* at 1158.) Ultimately, one has "furnished" alcohol once they ***tacitly authorize the disposition of alcohol*** and provide the means by which alcohol was supplied to minors. (*Id.*)

Like the minor host and father in *Sagadin*, the defendant in the instant matter exercised sufficient control over the alcohol she purchased for a court to have determined that she "furnished" and "sold" alcohol to the people at her party. Here, the disputed facts reveal that the defendant exclusively purchased the

alcohol, provided the means for consumption (i.e. provided cups, ice, and mixers) and arranged for a "bouncer" to regulate and charge ***anyone*** who was willing to pay an admission fee for entry and her alcohol. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 332:22-333:12, 334:17-335:16, 343:2-6, 351:22-352:13, 353:4-11, 354:5-13, 362:19-363:4, 365:4-19, 380-382, 387, 389-391, 402-404.] The fact that admitted guests such as Garcia served themselves alcohol is insignificant because defendant took substantial steps to make the alcohol available to anyone she knew or anyone willing to pay for it.

It is unclear based on the Court of Appeal's opinion why the *Bennett* case would be more authoritative than the *Sagadin* case when the facts of *Sagadin* are more analogous to the instant matter. Based on a plain reading of the Court of Appeal's opinion in the instant matter, it appears the facts and holding of the *Sagadin* case were wholly overlooked despite its obvious applicability to the instant matter. Additionally, it is unclear why the Court of Appeal would rely on a case entirely interpreting the meaning of "furnish" (i.e. *Bennett*) to reach the conclusion that defendant was a "social host" and not consider another case involving the same exact legal issues (i.e. *Sagadin*) and factual scenario as the one involved in the instant matter which reaches a totally different conclusion.

C. UNDER THE CIRCUMSTANCES HERE, DEFENDANT IS CIVILLY LIABLE UNDER BUSINESS AND PROFESSIONS CODE SECTION 25602.1.

1. The Legislative History of Business and Professions Section 25602.1 Supports a Finding of Liability.

The objective of statutory interpretation is to determine legislative intent. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.) "'If the words are clear, a court may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. At the same time, however, a statute is not to be read in isolation; it must be construed with related statutes and considered in the context

of the statutory framework as a whole. A court must determine whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other related provisions. Literal construction of statutory language will not prevail if contrary to the legislative intent apparent in the statutory scheme. Statutory language should not be given a literal meaning that results in absurd and unintended consequences.'" (*Kalway v. City of Berkeley* (2007) 151 Cal.App.4th 827, 833.) "We may also look to a number of extrinsic aids, including the statute's legislative history, to assist us in our interpretation." (*MacIsaac,* supra, 134 Cal.App.4th at p. 1083, fn. omitted.)

In 1978 the California Legislature enacted Civil Code section 1714, subdivision (c) and B&P Code section 25602, subdivision (b)[7] which generally provide civil immunity to "social hosts" and persons who furnish alcoholic beverages to third parties who subsequently become injured or injure others as a result of their alcohol consumption.[8] (See Civ. Code § 1714, subd. (c) and Bus. & Prof. Code § 25602, subd. (b).)

At the same time, the legislature carved out an exception to this general shield of liability by enacting B&P Code section 25602.1. This section provides for a separate "Cause of Action" for "***Supplying*** of alcoholic beverage to

---

[7] B&P Code section 25602, subdivision (b), provides that, "No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage." (Bus. & Prof. Code § 25602, subd. (b).)

[8] In 1978 the legislature amended Civil Code section 1714 and B&P Code section 25602 to add subdivisions (b) and (c) to each respective section creating what is currently known as "social host" immunity in California. This legislation was enacted to "abrogate" three decisions of the Supreme Court: *Vesely v. Sager* (1971) 5 Cal.3d 153; *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313; and *Coulter v. Superior Court* (1978) 21 Cal.3d 144 and generally reinstate the prior judicial interpretation that consumption and not the serving of alcoholic beverages is the proximate cause of injuries resulting from the intoxication of a drinker. (See *Baker v. Sudo* (1987) 194 Cal.App.3rd 936, 939-940.)

intoxicated minor[9]." The rationale for this exception is that the legislature considered minors more in need of safeguarding from intoxication than adults, because of the comparative inexperience in both drinking and driving. (*Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 979.)

Between 1978 and 1986, civil liability under B&P section 25602.1 was limited to licensed suppliers of alcohol. This section previously provided:

> Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

It was not until January 1, 1987, with the enactment of Senate Bill No. 1035 (Stats. 1986, ch. 289), that civil liability under B&P Code section 25602.1 was expanded to circumstances where physical injuries resulted from the supplying of alcohol by ***unlicensed*** "persons." (See Bus. & Prof. Code § 25602.1; *Baker v. Sudo* (1987) 194 Cal.App.3rd 936, 943 (emphasis added).) Currently, B&P Code section 25602.1 provides:

> Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against ***any person*** licensed, ***or required to be licensed***, pursuant to Section 23300, or ***any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave***, who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage, and ***any other person who sells, or causes to be sold***, any alcoholic beverage, to any obviously intoxicated minor where

---

[9] The use of the term "minor" under the B&P Code refers to persons under the age of 21 years. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004.)

> the furnishing, sale or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person.[10] (Bus. & Prof. Code § 25602.1 (emphasis added).)

In interpreting the 1987 amendment, the Court in *Baker v. Sudo* 194 Cal.App.3rd 936, noted that "Senate Bill No. 1053 did not clarify existing law in the area of liability for providers of liquor; ***it changed the law***." (*Id.* at 944 (emphasis added).) More importantly, the Court concluded that the purpose of the amendment was to impose civil liability on ***any person*** who sells any alcoholic beverage to an intoxicated minor where the sale proximately caused death or injury. (*Id.* (emphasis added).) Coincidentally, the Senate Committee's report on Senate Bill No. 1053, under the heading of "PURPOSE," provides:

> Existing law generally immunizes a provider of alcohol from liability for any injury caused by the consumer of the alcohol. However, it specifically holds a liquor licensee civilly liable for any injury or death proximately caused by the licensee's sale or furnishing of alcohol to an obviously intoxicated minor. The liability provision has been interpreted by the Ninth Circuit Court of Appeals to be inapplicable to a nonlicensed club on a United States military base which sells alcohol to an obviously intoxicated minor. [*Gallea v. United States* (1986) 779 F.2d 1403.]
>
> This bill would revise the liability provision to ***impose civil liability upon any person who sells or causes to be sold any alcoholic beverage to an intoxicated minor*** where the sale proximately causes a death or

---

[10] The italicized clauses were specifically added by the legislature in 1987 to address the decisions of *Cory v. Shierloh* (1981) 29 Cal.3d 430 and *Gallea v. United States* (1986) 779 F.2d 1403. The legislature expanded liability under B&P Code section 25602.1 in 1987 to include three classes or types of "persons" subject to liability. These three classes of "persons" include: (1) "any persons required to be licensed," or (2) "any persons authorized by the federal government to sell alcohol," and (3) "any other person who sells, or caused to be sold alcoholic beverages." (See Bus. & Prof. Code § 25602.1.)

> injury. It would also impose liability for the sale or furnishing of alcohol to an obviously intoxicated minor by nonlicensed liquor sellers required to be licensed.
>
> 'The ***purpose of this bill is to close gaps in the law*** which impose civil liability for selling alcohol to obviously intoxicated minors.' [*Gallea v. United States* (1986) 779 F.2d 1403.]
>
> The Senate committee report also notes judicial criticism of the law because it pinned liability on the license status of the liquor seller and quoted the *Cory*, supra, 29 Cal.3d 430, court on the subject.
>
> Additionally, under the Comments section, the Senate committee report observes: 'Imposing civil liability for any sale of alcohol to an obviously intoxicated minor ***would nullify the Cory*** (in part) ***and Gallea decisions***. The bill would not, however, affect the existing immunity for social hosts as it would not impose any liability for the free furnishing of alcohol.'" (*Baker v. Sudo* (1987) 194 Cal.App.3rd 936, 944, Footnote No. 10 citing (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.) as amended June 18, 1986, p. 2.) (emphasis added).)

In a paragraph captioned, "ARGUMENTS IN SUPPORT," the analysis stated:

> "...It is asserted that ***the act of selling alcohol to obviously intoxicated minors for commercial gain should be a sufficient basis for imposing liability***, and that imposing civil liability only upon licensed sellers does not serve the best interests of the public. Further, the effect of the distinction may not have been foreseen or intended by the Legislature." (*Ibid.*) (emphasis added).)

In *Baker v. Sudo*, an injured motor vehicle passenger brought a civil action arising from a single-vehicle accident occurring on June 30, 1984 against the

residents and owners of a residential property. In that case, guests were charged an admission fee where they listened to music being performed by a live band and were provided with unregulated amounts of beer and hard liquor. The trial court granted summary judgment for defendants based on the immunities provided by Civil Code section 1714, subdivision (c) and B&P Code section 25602, subdivision (b). The Court of Appeal affirmed the lower court's decision holding that the passenger's cause of action failed under B&P Code section 25602.1 ***as it stood at the time of the accident***, since liquor licensees were not involved in the case when the injury accrued. (*Id.* at 942-944 (emphasis added).) Additionally, the Court held that the 1987 amendment broadening the exception to unlicensed suppliers of alcohol ***after the time of the accident*** did not apply retroactively to the defendants in that case. (*Id.* (emphasis added).)

More importantly, *Baker* pointed out that it was the legislature's intent in passing Senate Bill No. 1035 to nullify the decisions rendered in *Cory* and *Gallea* as they relate to the licensing status of the alcohol supplying "person." The legislature's intent is clearly reflected in the change of the statutory language of B&P Code section 25602.1 as it read in 1978 to the current version amended version in 1987. A simple reading of B&P Code section 25602.1 reveals the addition of three specific clauses: 1) **"any person...required to be licensed,"** 2) **"any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave,"** and 3) **"any other person who sells, or causes to be sold...any alcoholic beverage"** All three clauses were added to specifically address the legislature's intent to nullify the decisions of *Cory* and *Gallea* based upon their specific facts.

In *Cory v. Shierloh*, a minor became intoxicated at a ***private party where an admission fee was allegedly charged by the minor host.***[11] Ultimately, the

---

[11] It is important to note that the Supreme Court stated that, "Our interpretation of this section makes it unnecessary for us to decide whether defendants, who allegedly charged an entrance fee to the party in question, fairly

plaintiff was injured when he left the party and lost control of his vehicle. (See *Cory v. Shierloh* (1981) 29 Cal.3d 430, 437.) The trial court sustained the host's demurrer based on B&P Code section 25602, subdivision (b), and Civil Code section 1714, subdivision (c), barring plaintiff's action. The Court of Appeal and the Supreme Court affirmed the trial court's decision with reservation concluding that the defendant was not licensed to sell alcohol as required to find liability under the pre-1987 amended version of B&P Code section 25602.1. In reaching that decision, the Supreme Court in *Cory* foreshadowed and likely facilitated the passage of the 1987 amendment to B&P Code section 25602.1 when it stated:

> We are not unmindful of the fact that the 1978 amendments constitute a patchwork of apparent inconsistencies and anomalies. Thus a licensed seller of liquor is liable to anyone injured by an obviously intoxicated minor served by the seller, while a nonlicensed, presumably illegal seller is not so liable... Causation in a common law sense, whether actual or physical, proximate or legal, has never pivoted on such a perilous and seemingly irrelevant fulcrum. Nonetheless, our function is to find, if possible, some means to sustain, not reject, those amendments. (*Id.* at 440.)

Similarly, in *Gallea v. United States,* the parents of a girl killed in a motorcycle accident, after a minor driver had been served alcoholic drinks at a naval base, brought a wrongful death action against the United States under the Federal Tort Claims Act ("FTCA"). The district court dismissed the United States from the action, and the parents challenged the judgment. The Court of Appeals affirmed, holding that the United States was not civilly liable because the naval base was not a licensed provider of alcohol under state law. The Court of Appeals also held that at the time of the decedent's death the state legislature intended the

---

may be deemed "social hosts" who are also shielded from liability by Civil Code section 1714(c)." (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 437.)

immunity exception to be limited to liquor suppliers licensed under state law. (*Gallea v. United States* (1986) 779 F.2d 1403, 1404-1406.)

In sum, it can only be interpreted that the legislature in 1986 intended to amend B&P Code section 25602.1 to address the prior judicial decisions of *Cory* and *Gallea* which rested on a person's licensing status rather that their actual tortious conduct. Based on plain language of B&P Code section 25602.1 and its expressed legislative intent to abrogate the holdings of *Cory* and *Gallea*, it is clear that the legislature intended to have this statutory exception apply to situations where unlicensed "persons" who were "required to be licensed" furnish or "sell" alcohol to intoxicated minors similar to that of *Cory* and *Gallea*. This is evidenced by legislature's stated intent to nullify the decisions in *Cory* and *Gallea* and the inclusion of the three clauses specifically added to address the facts of each respective case. Specifically, the clause "**any person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave**," was added to the B&P Code section 25602.1 to address the facts of *Gallea* because a sale of alcohol took place on a military base by a person authorized by the federal government to sell alcohol. Similarly, by amending B&P Code section 25602.1 to include the clauses **"any person...required to be licensed"** or **"any other person who sells, or causes to be sold...any alcoholic beverage"** the legislature specifically intended to have B&P Code section 25602.1 apply to persons who charge an admission fee for access to alcohol without a liquor license which otherwise would require one because a "sale" for an alcoholic beverage has occurred. If that were not the case, the inclusion of the amended language would not be necessary unless the legislature felt the charging of an admission fee for access to alcohol either required a license or was a "sale" of alcohol. In sum, it is plaintiffs' position that the facts of the instant matter are similar to that of *Cory* and that defendant is a "person" who was "required to be licensed" or a person who "sold" or "caused alcoholic beverages to be sold" to an

obviously intoxicated minor subjecting them to liability under B&P Code section 25602.1.

2. Defendant is a "Person" who is Liable under Business and Professions Code Section 25602.1.

Under B&P Code section 25602.1 a civil cause of action may be brought against "any person" when certain factual elements are met.[12] (See Bus. & Prof. Code § 25602.1.) B&P Code section 23008 defines "person" to include "***any individual***, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number." (Bus. & Prof. Code § 23008 (emphasis added).)

B&P Code section 23008 defines "person" to include "individuals." (Bus. & Prof. Code § 23008.) If the B&P Code was intended to limit liability to only those "persons" in the general business of selling alcohol, such as bars, taverns, clubs or liquor stores, the legislature would have made that clear by specifically limiting the definition of "persons" to those types of enterprises and excluding the term "individual" from its definition. Instead, the legislature fully intended to have "persons" defined liberally to include "individuals" such as the defendant.

---

[12] Under Judicial Council of California Civil Jury Instruction Number 422, civil liability will be imposed against a person under B&P Code section 25602.1 if:
(1) the defendant is licensed, authorized, *or required to have a license to sell alcoholic beverages*;
(2) the defendant *sold or gave* alcoholic beverages to a minor;
(3) the minor was less than 21 years old at the time;
(4) the defendant provided the alcoholic beverages to the minor who displayed symptoms that would lead a reasonable person to conclude that he or she was intoxicated;
(5) while intoxicated, the minor harmed himself or herself or plaintiff; and
(6) defendant's *selling or giving* alcoholic beverages to the minor was a substantial factor in causing plaintiff's harm. (See Judicial Council of California Civil Jury Instruction (CACI) no. 422 (emphasis added).)

Therefore, defendant, as an individual, is a "person" for the sake of B&P Code section 25602.1.

Under B&P Code section 25602.1 liability may be imposed on three classes or types of "persons." These persons include: (1) licensees ***or*** "any persons required to be licensed," (2) "any persons authorized by federal government to sell alcoholic beverages," ***and*** (3) "any other person who sells." (See Bus. & Prof. Code § 25602.1 (emphasis added).) Clearly, plaintiffs concede that there is no evidence to support the fact that defendant was actually licensed by the Department of Alcoholic Beverage Control or authorized by the federal government to sell or dispose of alcohol on the day of the incident. However, plaintiffs are of the position that defendant falls within the "any person required to be licensed" and the "any other person who sells" class of "persons" covered by the statute. Given the placement of the comma and the term "and" prior to the "any other person who sells" clause, defendant would be civilly liable under the first applicable class if she was "required to be licensed" and is found to have "sold, furnished, gave or caused to be sold any alcoholic beverage...to any obviously intoxicated minor." Under the second applicable class defendant would be civilly liable if she "sold, or caused to be sold, any alcoholic beverage, to any obviously intoxicated minor." In either circumstance, if a "sale" occurred on the evening of the incident, defendant would have been required to have a liquor license pursuant to B&P Code section 23399.1 subjecting her to liability under B&P Code section 25602.1. (See sections V.C.1 to 5 below for further discussion) Based upon the facts and authorities cited above, it is plaintiffs' position that a "sale" occurred on the evening of the incident. In the alternative, plaintiffs are of the position that defendant is also liable even without the finding of a "sale" because she was "required to be licensed" under B&P Code section 23399.1 because she furnished or provided alcoholic beverages to guests while the "the premises were open to the general public during the time alcoholic beverages were

served, consumed or otherwise disposed of." (See section V.C.3 below for further discussion)

3. Defendant was "Required to Have a License."

B&P Code section 23399.1, provides: "No license or permit shall be required for the serving and otherwise disposing of alcoholic beverages where ***all*** of the following conditions prevail:

1. That there is ***no sale*** of an alcoholic beverage.

2. That the ***premises are not open to the general public*** during the time alcoholic beverages are served, consumed or otherwise disposed of.

3. That the premises are not maintained for the purpose of keeping, serving, consuming or otherwise disposing of alcoholic beverages. (See Bus. & Prof. Code § 23399.1 (emphasis added).)

Defendant admits she did not have a license to sell alcohol on the day of the incident. [1AA 139.] Defendant further does not contest that an admission fee was charged to uninvited guests, including Garcia, on the evening of the incident. [See Respondent's Brief from Court of Appeal at p. 4] As a consequence, plaintiffs are of the position that an alcoholic beverage license was required because a "sale" occurred on the evening of the incident (See the below Section V.B.4 for further discussion) ***or***, in the alternative, the "premises were open to the general public during the time alcoholic beverages were served, consumed or otherwise disposed of." (See the below Section V.B.5 for further discussion) (See Bus. & Prof. Code § 23399.1.)

4. Defendant "Sold" or "Caused Alcoholic Beverages to be Sold."

Defendant is liable under either "any person... required to licensed" clause or the "any other person who sells, or causes to be sold...any alcoholic beverage" clause because she "sold" or "caused alcoholic beverages to be sold" on the evening of the incident. One thing that is evident based on the legislative history of B&P Code section 25602.1 is that the legislature believed "***the act of selling***

alcohol to obviously intoxicated minors for commercial gain should be sufficient basis for imposing liability." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 1053 (1985-1986 Reg. Sess.) (emphasis added).) Given the language and legislative history of the term of "sale" as defined by the B&P Code section 23025, it is apparent that defendant "sold" or " caused alcoholic beverages to be sold" on the evening of the incident.

a. Indirect Transactions where No Transfer of Possession of Alcohol Occurs Still Constitute a "Sale."

An analysis of the language and legislative history of B&P Code section 23025 and the language of Commercial Code section 2401, subdivision (2) establishes that a "sale" occurred on the evening of the subject incident. The original version of B&P Code section 23025 which was enacted with the Alcoholic Beverage Control Act of 1935 read as follows:

> "'Sell' or 'sale' and the phrase 'to sell' means and includes any of the following: to exchange, barter, traffic in; to solicit or receive an order for; to keep or expose for sale; to serve for a consideration with or without meals; to traffic in or deliver for value or in any way other than gratuitously; to possess with intent to sell. ***The transfer of title to alcoholic beverages unaccompanied by a transfer of possession of such beverages shall not be deemed a sale of such beverages.***" Stats. 1935, ch. 330, § 2(1) (emphasis added).

Under the original version of section 23025 a "transfer of possession" or direct and immediate transfer of alcoholic beverages was necessary to complete a "sale" for alcoholic beverages between two parties.

However, B&P Code section 23025 was amended in 1937 broadening the definition of "sale" to include indirect transactions where there is no immediate transfer of alcohol. The present day version of B&P Code section 23025 provides:

> "Sell," "sale," and "to sell" to include "***any transaction*** whereby, for ***any consideration***, title to

> alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages and soliciting or receiving an order for such beverages." (Bus. & Prof. Code § 23025 (emphasis added).)

Given the legislature's use and inclusion of the terms "any transaction" in the current version of Section 23025 and the complete removal of the "transfer of possession" clause from the original statute, clearly supports the fact that indirect transactions for consideration constitute a "sale" for the purchase of alcoholic beverages even where there is no immediate transfer of alcoholic beverages between two parties (i.e. a direct money transaction for a glass or bottle of alcohol).

Commercial Code section 2401, subdivision (2) addresses the passing of title. The pertinent part of this section provides: "Unless otherwise explicitly agreed ***title passes to the buyer at the time and place at which the seller completes his performance*** with reference to the physical delivery of the goods..." (Cal. Com. Code § 2401 subd. (2) (emphasis added).)

An analysis of B&P Code section 23025, read in conjunction with section 2401, subdivision (2) of the Commercial Code, leads to the conclusion that when a guest is charged a fee for entry and communal alcohol, title passes at the moment admission is granted by the host following receipt of payment. Under the instant facts, alcohol purchased by defendant was made available in a communal setting to any guest admitted into her party. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 380-382.] Here, title to that alcohol passed to defendant's guests when Brown, defendant's "bouncer," admitted paying guests into the residence. The moment a paying guest was allowed admission was the moment defendant, the seller, completed her performance as the alcohol was made available anyone within the residence.

The factual scenario of the instant case is no different than one paying to gain access to food and drink at a self-service buffet restaurant. Presumably the buffet restaurant, like defendant, is transferring its rights to the food and drink when it makes them available to patrons upon their payment to the cashier at the entrance and admission into the restaurant. A transaction where title is transferred in the buffet scenario like the instant matter occurs at that moment the patron provides monetary consideration for the food and drink and is admitted into restaurant. By no means can it be viewed that restaurant patrons are contributing to "a common fund" to defray the cost of the food or drink for the restaurant. Yet that is the very position the Court of Appeal in this matter assumes when guests unknown or uninvited to defendant, such as Garcia, are admitted into the party for monetary consideration.

b. "Any Consideration" is Sufficient for a "Sale."

Additionally, B&P Code section 25604[13] defines "consideration" within the context of a public nuisance to include "a ***cover charge***, the sale of food, ice, mixers or other liquids used with alcoholic beverage drinks, or ***the furnishing of glassware or other containers for use in the consumption of alcoholic beverage drinks***." (Bus. & Prof. Code § 25604 (emphasis added).)

The California Department of Alcoholic Beverage Control, the enforcement arm for the ABC Act, recently published a *Trade Enforcement Information Guide* in November 2009 ("TEIG") to serve as a reference and enforcement guide for the ABC Act. (See http://www.abc.ca.gov/trade/TEU Information Guide 2009 v2.pdf attached hereto as Exhibit "A."). Although not binding authority, the TEIG illustrates the practical application of the current law as interpreted by the California Department of Alcoholic Beverage Control. The TEIG addresses the

---

[13] B&P Code section 25604 states that, "it is a public nuisance for ***any person to keep, maintain, operate or lease any premises*** for the purpose of providing therein ***for a consideration a place for the drinking of alcoholic beverages by members of the public or other persons, unless the person and premises are licensed under this division***." (Bus. & Prof. Code § 25604 (emphasis added).)

B&P Code, specifically those sections relevant to the licensure requirements for events of various types where alcohol is provided. Under the sub-section entitled "Private Parties," the TEIG clearly indicates an alcohol license is required and an event is not a "private party" if ***any*** of the three elements delineated by B&P Code section 23399.1 are met. Interestingly, the TEIG further states: "Be aware that the definition of 'sale' includes ***indirect transactions*** other than merely paying for a glass of wine or other drink containing alcohol. (*Id.*; Bus. & Prof. Code §§ 23025, 25604 (emphasis added).) For instance, ***if an admission fee is charged*** or there is a charge for food and the alcohol is included, but not separately charged, ***an ABC license is required.***" (*Id.*; Bus. & Prof. Code §§ 23025, 25604 (emphasis added).)

California case law also provides some guidance as to the meaning of "sell" or "causing to sell" alcohol within the meaning of B&P Code Section 25602.1. (*Hernandez v. Modesto Portuguese Pentecost Association* (1995) 40 Cal.App.4th 1274, 1282.) In *Hernandez*, plaintiffs, the surviving passenger and relatives of three deceased minors from a single-vehicle accident, brought a civil action under B&P Code section 25602.1 against the owner of a building who rented the premises to a third party tenant host for an evening dance where alcohol was served to another minor. In affirming summary judgment for the defendant building owner,[14] the court found that simply providing the premises where alcohol was served by a third party tenant host did not constitute "causes to be sold" under section 25602.1. The appellate court held that civil liability under B&P Code section 25602.1 requires an affirmative act which ***relates*** to the sale of alcohol and necessarily brings about the resultant action to which the statute is directed. (*Id.* (emphasis added).) The court explained ***one who, having control over alcohol, directs or explicitly authorizes another to sell it to a minor who is already intoxicated falls within the statutory language [of section 25602.1].*** (*Id.*

---

[14] The *Hernandez* case never addressed the potential liability of the Comite Patriotico Mexicano, the third-party tenant host, under B&P section 25602.1 because it was not a party to the appeal.

(emphasis added).) On the other hand, merely providing a room where alcoholic beverages will be sold by others is not sufficient to satisfy section 25602.1's phrase, "causes [alcohol] to be sold." (*Id.*) The apparent intent of 25602.1 is to subject potential liability to those persons who, either personally ***or through an agent***, are in the position to detect signs of intoxication in a minor seeking to obtain alcohol from the person, and can refuse alcohol to that minor in order to protect the minor and reduce the potential that the minor will cause personal injury to himself or others as a result of his intoxication. (*Id.* at 1282-83 (emphasis added).)

While the Court of Appeal gave no weight to the November 2009 Trade Enforcement Information Guide (TEIG) published by the Department of Alcoholic Beverage Control, plaintiffs find no reason why that court did not consider B&P Code sections 23025 and 25604 and the *Hernandez* case when it determined that no "sale" occurred on the day of the incident. First, the use of the terms "***any*** transaction" within B&P Code section 23025 supports the position that both direct and indirect transactions, i.e., where consideration is not directly exchanged for a glass or bottle of alcohol, constitute a "sale" of alcohol given the legislature's use of the word "any." The 1937 amendment to B&P Code section 23025 would support such a position in that the legislature removed the requirement for a "transfer of possession" from the original version of the statute. There is no dispute that defendant charged a cover charge of $3 to $5 and furnished alcohol, glassware, mixers, and ice to strangers at her party. [2AA 354:5-13, 365:4-19, 389-391, 402-404.] By accepting the $3 to $5, defendant was transferring title to alcohol she already purchased to anyone who was admitted into the party at the time of admission.

Second, the use of the terms "***any*** consideration" within B&P Code section 23025 supports the position that any form of payment, i.e. monetary exchange or the exchange of goods or services for alcohol or the right to alcohol, for any amount constitutes a "sale" also given the legislature's use of the word "any."

Finally, the term "any" connotes no requirement that defendant actually make or realize a monetary profit from her alcohol sales. Just because defendant's party may have been a poorly run enterprise does not negate the fact that a "sale" occurred for "any" consideration. Ultimately, it is not the Court's role to determine profitability of the enterprise. It is the Court's duty to determine when "***any transaction***" for "***any consideration***" where title is transferred has taken place under the law. (Bus. & Prof. Code §§ 23025, 25604 (emphasis added).)

c. Defendant's Admission Fee was a "Sale" for the Purchase of Alcohol.

Presumably, the defendant in the instant matter will take the position that "admission" into her party was "sold" with the alcoholic beverages being "complimentary." Fortunately, that exact issue has been previously analyzed by the California Department of Alcoholic Beverage Control in an opinion prepared by the Office of the Attorney General of the State of California. The Office of the Attorney General ultimately concluded that the offering a "complimentary" alcoholic beverage to any guests while at the same time charging for some other product or service will have been deemed to have "sold" alcoholic beverages, thereby necessitating an alcoholic beverage license. (68 Ops. Cal. Atty. Gen. 263, 265-267 (1985).) This conclusion was reached by comparing a number of out-of-state cases which analyzed the definition of "sale" in reference to alcoholic beverage control statutes similar to that of California's B&P Code section 23025. One similar case in particular, *New York State Liquor Authority v. Sutton Social Club, Inc. aka, Top Floor Discotheque* (1978) 93 Misc.2d 1024, concluded that a so-called "social" club violated the New York Alcoholic Beverage Control Act[15] when it required "members" and guests to pay a $6 to $10 "admission" fee without

---

[15] "Sale" was defined under the New York Alcoholic Beverage Control Act as "***any transfer***, exchange or barter ***in any manner or by any means*** whatsoever for ***a consideration***,..." (68 Ops. Cal. Atty. Gen. 263, 265 (1985);citing the New York Alcoholic Beverage Control Act (emphasis added).

a liquor license where "free" alcoholic beverages and dancing was made available at the option of the attendees. Similarly, providing "complimentary" glasses of wine with a paid meal at a restaurant constituted a "sale" for alcohol, thereby necessitating a liquor license under the New York Alcoholic Beverage Control Act. (See *Id.* citing *New York State Liquor Authority v. Fluffy's Pancake House* (1978) 409 N.Y.S.2d 20.)

Ultimately, the Office of the Attorney General of the State of California believed, "to hold otherwise, would thwart the purposes of the alcoholic beverages control laws in our state, that is, to promote temperance, to control the number and location of licensed premises and to insure the proper background investigation of those who are to be permitted to sell such beverages."

Moreover, the facts of the instant matter also support the conclusion that the admission fee was for the alcohol provided by defendant. In this case alcohol was provided at defendant's party without limitation in a communal setting in a vacant and unfurnished rental property. [1AA 139 and 2AA 308:5-310:17, 311:11-17, 312, 315:9-316:11, 318:13-15, 328:10-23, 380-382.] With exception to mixers, ice, and plastic cups, ***alcohol was the only consumable item*** made available by defendant to admitted guests at her party. [2AA 308:21-25, 309:1-12, 310:18-25, 311:1-17.] Other than the alcohol provided by defendant no other alcohol was brought onto the premises by any guest in attendance at the party. [2AA 318:13-15.] Lastly, the vast majority of the people who attended defendant's party were under the age of 21 years. [2AA 312:22-25, 332:10-17.] In essence, the property in this matter was a public nuisance as defined by B&P Code section 25604 when it became a safe haven for underage individuals to illegally purchase and consume alcohol which was not otherwise legally available to them in the public. In sum, all of these acts relate to the "sale" of alcohol. To hold that the admission fee charged by defendant was not a "sale" under B&P Code section 23025 "would thwart the purposes of the alcoholic beverages control laws in our state..." (See 68 Ops. Cal. Atty. Gen. 263, 267 (1985).)

5. The Premises were Open to the General Public while Alcoholic Beverages were Served, Consumed or Otherwise Disposed of.

Defendant was also "required to be licensed" under B&P Code section 25602.1 on the evening of the incident because the "***premises were open to the general public*** during the time alcoholic beverages are served, consumed or otherwise disposed of" as required by B&P Code section 23399.1 (See Bus. & Prof. Code § 23399.1 (emphasis added).)

Here, the Court of Appeal in its opinion glanced over the second element of B&P section 23399.1, presuming defendant's party was not open to the general public because as stated in the court's opinion "only those to whom the party was publicized" were admitted onto the premises. (See *Ennabe v. Manosa* (2010) 190 Cal.App.4th 707, 719.) The Court of Appeal took the position that if ***anyone*** becomes aware of an event on private property that the person becomes a "guest" of the host by virtue of their mere knowledge of the event. This position clearly creates an illogical precedent. The Court of Appeal presumes that anyone walking by defendant's property or hearing about her party from any third-party becomes a "guest" of defendant by virtue of their knowledge of the party. Such a conclusion is illogical and establishes poor legal precedent for all cases involving land possessors and occupiers and their respective duty to those on their property.

Moreover, Garcia and his friends were ***unknown to and uninvited*** by the defendant. Defendant clearly admits she did not know Garcia or his friends nor did she invite them to the party. [2AA 318:13-15, 336:2-9, 362:19-363:4, 387.] If she did not know Garcia and his friends and she did not invite them, then they are clearly strangers and members of the general public. This is especially true if these same strangers are required pay to gain access to the property and the alcohol contained therein. Additionally, the record does not indicate that any of defendant's friends knew or invited Garcia or his friends to the party. In sum, defendant was "required to be licensed" on the day of her party because the premises were open to the general public while alcohol was being consumed.

6. Garcia and Decedent were Less than 21 Years Old.

It is undisputed that both Garcia and the decedent were under 21 years of age on the day of the incident. [1AA 014-016, 056 and 2AA 320:22-24]

7. Garcia and Decedent were "Obviously Intoxicated" Upon Entry and Became Increasingly More Intoxicated During Defendant's Party.

The "proper test" for determining whether a minor is "obviously intoxicated" is whether the use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are "plain" and "easily seen or discovered." (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140.) If such outward manifestations exist and the defendant still provides the minor so affected, she has violated the law, whether this was because she failed to observe what was plain and easily seen or discovered, or because, having observed, she ignored that which was apparent. (*Id.*)

Witnesses observed Garcia and decedent as being "obviously intoxicated" upon entry onto Respondents' premises. According to Abuershaid and Bosley, Garcia's coordination, speech and balance were impaired and he exhibited obvious signs of intoxication when admitted into the party. [2AA 336:2-338:14, 389-391, 402-404, 415-421.] Moreover, it was known to defendant and other witnesses that decedent was at another party drinking prior to arriving at the party held by respondent. [2AA 320:9-321:1, 389-391, 402-404.] Decedent also exhibited obvious signs of intoxication prior to consuming any alcohol at respondent's party. [2AA 320:9-321:1, 389-391, 402-404.]

While on the premises Garcia and decedent consumed additional amounts of alcohol furnished by respondent. David Ennabe, decedent's younger brother, observed decedent drink alcohol furnished and supplied by respondent during the party. [2AA 320:9-321:1, 389-391, 402-404.] With regard to Garcia, he was observed by Abuershaid to have drunk what appeared to be a beer supplied by

respondent taken from respondents' refrigerator. [2AA 336:2-338:14.] Bosley spoke to Garcia at the party saw him drink tequila and mixed alcoholic beverages provided by respondent at the party. [2AA 389-391.] This additional alcohol caused Garcia to become overly belligerent with the other individuals at the party. In fact, Garcia was so intoxicated that he was seen dropping his pants several times while dancing, soliciting sex from female guests and began to accost female guests at defendant's party. [2AA 340:10-25, 341:21-342:11, 415-421.] Consequently, Garcia was asked to leave and was escorted off the premises to his vehicle by several males including the cross-defendants and decedent. Once in his vehicle, Garcia proceeded to run over decedent who was standing in front of respondents' property. [2AA 320:9-321:1, 330:12-24, 340:10-15, 341:1-18, 340:10-25, 341:21-342:11, 389-391, 402-404, 415-421.] Decedent's own alcohol consumption at respondent's party caused his faculties, including his judgment, coordination, balance and reflexes to become significantly impaired. [2AA 320:9-321:1, 330:12-24, 340:10-15, 341:1-18, 340:10-25, 341:21-342:11, 389-391, 402-404, 415-421.] As such, he was unable to avoid the oncoming vehicle being driven by an overly intoxicated Garcia. Based on these observed manifestations both minors were obviously intoxicated as a result consuming alcohol supplied by respondent.

8. While Intoxicated, Decedent "was Injured."

Based on the case law and the plain language of B&P Code section 25602.1, it is clear both first party (i.e. self-inflicted injuries from underage alcohol consumption) and third party (i.e. injuries caused by intoxicated minors) civil actions are available to aggrieved parties for personal injury or death. (*Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 977.) In *Chalup v. Aspen Mine Co.* 175 Cal.App.3d 973, the Court held that a "minor" can bring a personal injury claim on behalf of himself or herself for any damages sustained as a result of being intoxicated. (*Id.*) The courts stated "any person" may bring an action

against individuals who furnish alcoholic beverages to obviously intoxicated minors where the furnishing is the proximate cause of the injury or death. (*Id.*) The usual meaning of the words "any person" include injured intoxicated minors in the absence of a statement excluding them, and the Legislature made no such exclusion, in contrast to the language of other statutes dealing with minors. (*Id.*) Additionally, both the legislative history of the statute and its subsequent interpretation by the Supreme Court supported the conclusion that minors themselves were intended to be included in the class of persons who could bring actions against persons who serve alcohol. (*Id.*)

Defendant is civilly liable for plaintiffs' damages under B&P Code section 25602.1 whether the claim is a first or third party claim. Based on the language of the statute and the holding of *Chalup*, it does not matter whether decedent was the root of his own injures by means of his own intoxication or if an intoxicated third party such as Garcia caused his injuries.

9. Defendant's Furnishing or Selling of Alcoholic Beverages was a Substantial Factor in Causing Plaintiffs' Injuries.

"'Whether a defendant's conduct actually caused an injury is a *question of fact*...that is ordinarily for the jury...' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not.'" (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 (emphasis added).) "The substantial factor standard is a relatively broad one, requiring *only* that the *contribution of the individual cause be more than negligible or theoretical.* (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 (emphasis added).)

Defendant was a substantial factor in causing this incident. In opposing the motion for summary judgment, plaintiffs provided the declaration of Steven Bucky, Ph.D., an expert in the areas of psychopathology, alcoholism, chemical

dependency and forensic psychology. Dr. Bucky specializes in the physical, mental, and emotional reaction of humans while under the influence of drugs and alcohol. Based largely on the statements of witnesses, the police investigation and his experience, Dr. Bucky was able to conclude that both Garcia and decedent had impaired perception, coordination and judgment due to the over-consumption of alcohol supplied by respondent. [2AA 415-421.] Here, Garcia's operation of his vehicle in striking decedent is more likely than not related to his intoxicated condition. [2AA 415-421.] Moreover, decedent's inability to comprehend and avoid Garcia's oncoming vehicle is also indicative of being intoxicated. [2AA 415-421.] Defendant offered no evidence to the contrary.

While it is plaintiffs' position that the party should not have ever occurred, it is evident that defendant's failure to regulate the alcohol consumption of Garcia and decedent was more than a negligible contribution to an already combustible situation where underage drinkers were allowed to consume alcohol without limitation in a party environment. Providing Garcia and decedent unlimited amounts of alcohol without proper supervision was a substantial factor in causing the death of Andrew Ennabe. [1AA 056, 139 and 2AA 308:5-309:12, 312-313:3, 313:9-24, 315:9-316:11, 318:13-15, 320:9-24, 336:2-338:14, 340:10-15, 357:15-24, 358:5-21, 359:1-19, 360:9-25, 364:19-22, 380-382, 387, 389-391, 402-404, 415-421.] Defendant should have never had the party but at the very least should have personally monitored which guests were being admitted onto her property and prevented uninvited or unfamiliar individuals from entering her premises. Such an act would have prevented the admission of an already obviously intoxicated and belligerent Garcia. Therefore, defendant's misfeasance in illegally supplying alcohol to Garcia and decedent.

D. EXTENDING CIVIL IMMUNITY TO DEFENDANT UNDER THE CIRCUMSTANCES WILL VIOLATE THE STATED PUBLIC POLICY CONCERNS ARTICULATED IN THE ABC ACT AND WILLTHWART THE LEGISLATURE'S DESIRE TO CURB UNDERAGE ALCOHOL-RELATED ACCIDENTS.

As mentioned above, the ABC Act was enacted "for ***the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.***" (Bus. & Prof. Code § 23001 (emphasis added).) Under California's Constitution, ***no person shall sell, furnish, give, or cause to be sold*** any alcoholic beverage to any person under the age of 21 years, and ***no person*** under the age of 21 years shall purchase any alcoholic beverage. (California Constitution, article XX, section 22 (emphasis added).) The California Constitution also makes it unlawful for ***any person*** other than a licensee of the ABC to sell alcoholic beverages within the State of California. (California Constitution, article XX, section 22.)

The federal government set the age of 21 years as the minimum age to purchase and publicly possess alcohol. (23 U.S.C. § 158.) Incidentally, California complied with this federal requirement by passing B&P Code section 25662, subdivision (a).[16] Additionally, in California, "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." (Bus. & Prof. Code § 25658, subd. (a).) Therefore, a person in California cannot legally purchase, possess, furnish, sell or give away alcohol unless he or she is at least 21 years of age.

---

[16] B&P Code section 25662, subdivision (a) provides, "Any person under the age of 21 years who has any alcoholic beverage in his or her possession on any street or highway or in any public place ***or in any place open to the public*** is guilty of a misdemeanor ..." (Bus. & Prof. Code § 25662, subd. (a) (emphasis added).)

In establishing "social host" immunity under Civil Code section 1714, subdivision (c), the legislature contemplated only those circumstances where alcoholic beverages were given, furnished or sold by "persons" that could legally purchase, possess and sell them. Based on the above-referenced laws, those "persons" would include "individuals" over the age of 21 years and licensees governed by the ABC Act. The rationale in allowing these particular persons the ability to possess, sell, or give away alcohol is that they are in the position based on age, experience, and knowledge to detect signs of intoxication in third parties seeking to obtain alcohol from them which they can ultimately refuse in order protect the third party from injury to himself or others. (*Schaffield v. Aboud* (1993) 15 Cal.App.4th 1133, 1142-1143.)

If civil immunity applied to legally incompetent persons (i.e., individuals under the age of 21or unlicensed sellers of alcohol) then the ABC Act's stated purpose in B&P Code section 23301 would run contrary to its own laws establishing minimum age and licensing requirements. The legislature could not have reasonably intended to extend civil immunity to minor hosts who become responsible for the alcohol consummation of other minors when they are not legally entitled to purchase and publicly possess alcohol. Extending civil immunity to minors, such as the defendant in this case, would not only discourage temperance in the use and consumption of alcoholic beverages but it would encourage a general disrespect for the laws and licensing requirements of this State and threaten the safety of public as a whole. Therefore, it logically flows that a "person" may be extended civil immunity as a "social host" only when they are legally capable of purchasing, possessing and selling alcohol in the first place.

Lastly, immunizing defendant from civil liability goes against the legislature's desire to broaden liability to "persons" who serve or sell alcoholic beverages to minors. It has been well documented that younger individuals, particularly those under the age of 21, are more likely to be involved in alcohol-related accidents and violent incidents. (*Cory v. Shierloh* (1981) 29 Cal.3d 430,

435.) As previously noted, B&P Code section 25602.1 was amended in 1987 to extend civil liability to ***any*** person, including unlicensed purveyors of alcohol, who supply or sell alcoholic beverages to minors.

In fact, in order to expand civil liability the legislature enacted Civil Code section 1714, subdivision (d) in 2011. This new subdivision of Section 1714 of the Civil Code provides, "Nothing in subdivision (c) shall preclude a claim against a parent, guardian, or another adult who knowingly furnishes alcoholic beverages at his or her residence to a person under 21 years of age, in which case, notwithstanding subdivision (b), the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death." (Civ. Code § 1714, subd. (d).)

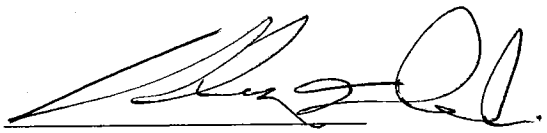
The enactment of Civil Code section 1714, subdivision (d) only evidences the legislature's intent to further limit the civil immunities created by Civil Code section 1714, subdivision (c) and 25602, subdivision (b) passed in 1978 and to expand the scope of liability where underage drinking and minors are involved. With the 1987 amendment to B&P Code section 25602.1 and the subsequent passage of Civil Code section 1714, subdivision (d), the legislature has extended and further broadened the circumstances in which civil liability can be imposed when underage drinkers are involved in an accident. While plaintiffs concede Civil Code section 1714, subdivision (d) was not in existence at the time of the subject incident and this specific statute does not contain any language which allows for a retroactive application, it is clear that the legislature has continually sought to prevent underage drinking and protect the public from tortious acts of those who furnish and sell alcohol to minors.

VI. CONCLUSION

For the forgoing reasons, plaintiffs respectfully request that this Court reverse judgment and remand the matter for trial.

Respectfully submitted,

DATED: April 7, 2011

By 

Abdalla J. Innabi
Amer Innabi
INNABI LAW GROUP, APC
Attorneys for Plaintiffs and Appellants,
FAIEZ and CHRISTINA ENNABE,
individually and Administrators of the
ESTATE OF ANDREW ENNABE

CERTIFICATE OF COMPLIANCE

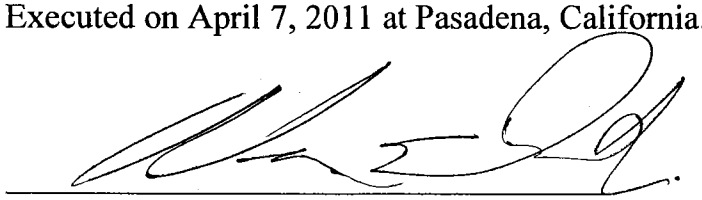
I, Abdalla J. Innabi, declare that:

I am an attorney in the law firm of Innabi Law Group, APC, which represent Plaintiffs and Appellants Faiez and Christina Ennabe, individually and Administrators of the Estate of Andrew Ennabe.

This Opening Brief on the Merits was produced with a computer using Microsoft Word. It is proportionately spaced in 13-point Times Roman typeface. The brief contains 13,976 words including footnotes, excluding the tables and this certificate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 7, 2011 at Pasadena, California.



Abdalla J. Innabi

EXHIBIT "A"

Trade Enforcement Information Guide

November 2009

NOTE: The information contained in this Guide is intended to be a quick reference to common questions and issues involving Trade Practices. It is not intended to and does not replace or change the information contained in the ABC Act, case law or the California Code of Regulations.

INDEX

agent of the supplier, even if no money is given or trade has occurred. This would be considered "joint advertising" and is prohibited.

Event Sponsorship by Non-Retail Licensee at Retail Premises

Generally, suppliers of alcoholic beverages cannot sponsor events at retail licensed premises. There are some statutory exceptions contained in the ABC Act for particular venues, such as certain arenas, stadiums, etc.

Sponsorship of Station Concert Hotlines by Non-Retailers

Alcoholic beverage suppliers cannot buy title sponsorship of "Hot Lines" or "Event Lines" from radio stations which listeners call to hear a listing of events at retail locations nor may they be referenced as a sponsor of such "Lines."

NON-RETAIL SALES OF ALCOHOLIC BEVERAGES

A person who wants to import and sell beer or wine to wholesalers only should apply to this Department for a beer and wine importer's general (Type 10) license. To import and sell beer or wine to retailers and wholesalers, a beer and wine importer's (Type 09) license and a beer and wine wholesaler's (Type 17) license are needed. On the other hand, if an out-of-state person merely wishes to sell or ship to California licensed importers and will not establish a business in California in that representatives would only be in the state on a sporadic basis to make general arrangements or to do general missionary work, and he/she will not warehouse or import alcoholic beverages into California and/or hire any California residents as employees, or otherwise establish a business presence in California, no licenses would be required. Importer licenses are not required for companies that obtain beer and/or wine solely from sources within California.

A person who wants to import and sell distilled spirits to wholesalers only should apply to this Department for a distilled spirits importer's general (Type 13) license. To import and sell distilled spirits to retailers and wholesalers, a distilled spirits importer (Type 12) license and a distilled spirits wholesaler (Type 18) license are required. On the other hand, if an out-of-state person merely wishes to sell or ship to California licensed importers and will not be establishing a business in California in that representatives would only be in the state on a sporadic basis to make general arrangements or to do general missionary work, and he/she will not warehouse or import alcoholic beverages into California and/or hire any California residents as employees, or otherwise establish a business presence in California, no licenses would be required.

Out-of-state or foreign distillers that have a sales office or other business presence in California should apply for a Distilled Spirits Manufacturer's Agent (Type 05) license.

Alcoholic beverages can be brought into California only by common carriers and only when the beverages are consigned to a licensed importer, and only when consigned to the premises of the licensed importer or to a licensed importer or customs broker at the premises of a public warehouse licensed by this Department. Section 32109 of the Revenue and Taxation Code provides that common carriers (except railroad and steamship companies) before engaging in the business of transporting shipments of alcoholic beverages into this state must register with the California Board of Equalization and make application for an interstate alcoholic beverage transporter's permit. Direct shipment of alcoholic beverages to California retailers is prohibited.

Applications for licenses are obtained from the district office having jurisdiction over the geographical location of the business.

PRIVATE PARTIES

Section 23399.1 of the California Business & Professions Code explains the circumstances when an alcoholic beverage license is not required:

1. That there is no sale of an alcoholic beverage.
2. That the premises are not open to the general public during the time alcoholic beverages are served, consumed or otherwise disposed of.
3. That the premises are not maintained for the purpose of keeping, serving, consuming or otherwise disposing of alcoholic beverages.

All three of the above elements must exist. If a proposed event meets the statutory definition of a "private party," then no ABC license is required.

Note: Any event occurring on a licensed premises is not a "private party" under this provision. Events or activities on a licensed premises are subject to all rules and regulations applying to the licensee.

Be aware that the definition of "sale" includes indirect transactions other than merely paying for a glass of wine or other drink containing alcohol. For instance, if an admission fee is charged or there is a charge for food and the alcohol is included, but not separately charged, an ABC license is required.

Note: No provision of the ABC Act may be violated even though the event itself does not require a license.

If a license is required, or you have a question about a particular event, you should contact the ABC district office closest to where the event will occur.

RECORDS

Records of alcoholic beverage sales transactions should be kept separate from non-alcoholic beverage sales records, and should be kept for a period of three years. Records must be readily accessible and provided to the Department upon request.

Maintain Alcoholic Beverage License Information with Records

Business and Professions Code Section 23300 requires sellers of alcoholic beverages to obtain an alcoholic beverage license. Suppliers must determine the validity of a retailer's alcoholic beverage license before selling alcoholic beverages to that retailer. Suppliers should maintain license numbers and license status changes with their customer records to prevent sales to unlicensed persons.

RETAIL SALES PRICE

The Department of Alcoholic Beverage Control does not regulate the retail price of alcoholic beverages.

RETAILER-TO-RETAILER PURCHASES OF ALCOHOLIC BEVERAGES

Business and Professions Code Section 23402 requires permanent retail on- and off-sale licensees to purchase alcoholic beverages for resale from wholesalers, manufacturers, winegrowers, or rectifiers. Daily On-Sale General licensees must purchase distilled spirits from off-sale general retail license holders. Please note that warehouse stores such as Costco, Sam's Club, etc. are *retailers* and state law prohibits retailers from selling alcoholic beverages for resale, except to holders of a Daily On-Sale General license.

RETURNS OF ALCOHOL BY CONSUMERS TO RETAILERS

Section 25600 authorizes the return (for refund or exchange) of alcoholic beverages to the seller by **dissatisfied** consumers. The advertising of "money-back guarantees" by retailers is specifically disapproved.

Note: State law does not require the seller to accept a return or make an exchange of alcoholic beverages. This is discretionary with the licensee.

PROOF OF SERVICE
BY OVERNIGHT COURIER

CASE NAME: **Ennabe et al. v. Manosa et al.**
SUPREME COURT CASE NUMBER: **S189577**
COURT OF APPEAL CASE NUMBER: **B222784**
SUPERIOR COURT CASE NUMBER: **KC053945**

I, the undersigned, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a Citizen of the United States and resident of the County of Los Angeles where the within-mentioned service occurred.

2. My business address is 2500 E. Colorado Ave., Suite 230, Pasadena, California 91107.

3. On 04/01/11, I served the ***OPENING BRIEF ON THE MERITS*** by overnight courier as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and Federal Express picked up the envelopes in Pasadena, California, for delivery as follows:

Richard H. Nakamura Dean A. Olson Sheena Y. Kwon MORRIS POLICH & PURDY, LLP 1055 West Seventh Street, 24th Floor Los Angeles, CA 90017 (*one copy*)	Clerk of the Court Supreme Court of the State of California 350 McAllister Street San Francisco, CA 94102 *(one original & 13 copies)*
Honorable Robert A. Dukes Superior Court of California, East District Los Angeles County – Department R 400 Civic Center Plaza Pomona, CA 91766 (*one copy)*	Clerk of the Court Court of Appeal Second Appellate District, Division 1 300 So. Spring St. 2nd Fl Los Angeles, CA 90013 (*one copy*)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 04/07/11

DANIEL INNAMI
Print

Signature