

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PAUL GHYSELS,

Plaintiff and Appellant,

v.

INTERFRATERNITY COUNCIL et al.,

Defendants and Respondents.

A131500

(Alameda County
Super. Ct. No. RG10494360)

I.

INTRODUCTION

This lawsuit stems from the friction between permanent residents of the South of Campus neighborhood of Berkeley, California and the residents of the 35 or so fraternity houses located in the neighborhood who sponsor social events during the 10-month school year at which alcohol is furnished. One of the permanent residents, Paul Ghysels (plaintiff), filed a putative class action against numerous fraternities, property owners, property management companies, and the fraternity governing body for the University of California, Berkeley (collectively defendants). Plaintiff claims that he and the putative class members have been “deprived of the quiet and secure enjoyment of their homes, and . . . have suffered diminution in the value of their property . . .” by living in close proximity to fraternity-sponsored social events. Plaintiff alleges these events are characterized by excessive alcohol consumption, the playing of loud music, littering, public urination, and damage to nearby property.

The trial court granted defendants' demurrer without leave to amend and dismissed plaintiff's second amended complaint (SAC), which alleged causes of action for negligence, nuisance, and unfair competition. The trial court found that plaintiff had failed to articulate any possible legal theory of liability which would place defendants beyond the broad immunity from civil liability granted by Civil Code section 1714, subdivision (c), to social hosts who furnish alcoholic beverages to their guests.¹ The trial court believed defendants were shielded from civil liability because "the essence of all of Plaintiff's claims is that Defendants allowed for the provision of alcohol and failed to adequately monitor the resulting behavior," and there were no facts which plaintiff could allege which would warrant another chance to amend his complaint in an attempt to circumvent immunity in this case.

Given the factual allegations made in the SAC, we find the trial court properly sustained defendants' demurrer based upon the "broad statutory immunity against civil liability" existing for social hosts who furnish alcohol to their guests. (*Bass v. Pratt* (1986) 177 Cal.App.3d 129, 132 (*Bass*)). Nonetheless, in light of the general rule of liberality in permitting amendments to a complaint (see, e.g., *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971 (*Aubry*)), we find plaintiff should be permitted to amend his complaint to attempt to cure this deficiency as it relates to his causes of action for public and private nuisance.² Accordingly, we affirm in part and reverse in part.

¹ Under California's social host immunity statute, "[n]o 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); see also Bus. & Prof. Code, § 25602, subd. (b) [providing similar immunity from civil liability for individuals who furnish alcohol to an obviously intoxicated person].)

² The lower court's decision, and this appeal, focus on the law as it existed at the time plaintiff commenced this lawsuit. However, as we discuss, the Legislature has expanded the law regarding social host liability since that time, specifically where it is alleged that alcohol has been served to minors. Accordingly, we need not decide today whether subsequent developments create an opportunity for plaintiff to plead and prove a cause of action against defendants based on conduct occurring since this legislative change has taken place.

II.

FACTS AND PROCEDURAL HISTORY

“In reciting the facts, we are guided by well-settled principles governing appellate review after the sustaining of a demurrer without leave to amend. ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]” ’ ” (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 41 (*Traders Sports, Inc.*).

The operative complaint for our purposes is the SAC alleging causes of action for: (1) private and public nuisance, (2) unfair competition, and (3) negligence. The common factual allegations supporting these causes of action are that the named fraternities “have organized and hosted, on multiple occasions over a period of years, weekend social events at which alcohol is served, served in excess regardless of the recipient’s state of intoxication, and provided to underage persons, all in violation of City of Berkeley ordinances, state law, University rules, and the CalGreek Social Code.” The SAC asserts that during fraternity-sponsored social events plaintiff’s neighborhood becomes “a high-energy party zone” resulting in “hundreds of young people in the street—most of them drunk, shouting at each other and into their cell phones, roving from party to party.” These events have raised numerous quality-of-life issues for area residents, including repeated instances of “disturbance of the peace, vandalism, interpersonal and group violence, . . . disregard for the safety, well-being and comfort of neighbors, disregard for the property rights of neighbors, and promotion of anti-social behaviors which damage the habitability of the entire neighborhood and degrade the local environment.” Generally, the SAC alleges that these social events are conducted with utter disregard for the property rights, safety, well-being, and comfort of those who live in proximity to the fraternities.

The SAC claims the defendant fraternities actively promote these social events, and that such events are conducted with the full knowledge and acquiescence of defendant housing corporations and property management companies. Plaintiff, as well as other residents have complained, in person and in writing, to many of the defendants

directly and to the University of California and the City of Berkeley hundreds of times over the years, to no lasting effect. The filing of a class action lawsuit became necessary because previous efforts “have failed to produce any lasting changes in the wrongful conduct of fraternity members.”³

The SAC also requested that the lawsuit be certified as a class action. It defines two subclasses of individuals who are described as members of the purported class: (1) persons who “in recent years, have owned and/or occupied residential property within 1000 feet of a defendant fraternity house” who have had “his or her right to quiet and secure enjoyment of their home repeatedly and persistently invaded . . . by defendant fraternities,” and (2) persons who “in recent years, while engaged in lawful activity within 1000 feet of a defendant fraternity house, have experienced unwelcome encounters with a person (or persons) intoxicated as a result of having consumed alcohol on the premises of, or supplied by, a defendant fraternity house.”

Defendants jointly demurred to the SAC and filed a motion to strike. Among other things, defendants claimed that by enacting Civil Code section 1714, subdivision (c), the Legislature specifically declared social hosts to be immune from any civil liability arising out of the furnishing of alcoholic beverages to any person. Consequently, defendants argued they could not be found liable based on the actions of third-party individuals who were drinking or intoxicated, even if defendants were responsible in some way for providing alcohol to them. However, this argument was limited solely to plaintiff’s cause of action for negligence.

In response, the trial court requested supplemental briefing on two issues: (1) whether the immunity provided social hosts in Civil Code section 1714 also applied to plaintiff’s causes of action for nuisance and unfair competition; and (2) if the first

³ The gravity of the problem is emphasized in the briefing provided by amicus curiae who have all filed briefs in support of plaintiff on appeal. Specifically, we have granted permission for the Alcohol Policy Network, Dwight Hillside Neighborhood Association, South of Campus Neighborhood Association, and Berkeleyans for a Livable University Environment to file amicus briefs in this matter. (Order, May 7, 2012, Ruvolo, P. J.)

question was answered in the affirmative, whether the court, on its own motion, should grant defendants judgment on the pleadings.

After receiving supplemental briefing on these questions, the trial court not only sustained defendants' joint demurrer to plaintiff's SAC without leave to amend, but also granted judgment on the pleadings on the court's own motion. The court found that Civil Code section 1714, subdivision (c) barred plaintiff's causes of action for negligence, nuisance, and unfair competition because "[e]ach claim is predicated on a factual pattern that largely revolves around the furnishing and consumption of alcohol." While noting that some of plaintiff's causes of action alleged behavior that was not necessarily alcohol-related, for example, the improper disposal of party debris and the creation of excessive noise, the court ruled that "the essence of all of Plaintiff's claims is that Defendants allowed for the provision of alcohol and failed to adequately monitor the resulting behavior." Accordingly, the court ruled that the immunity provided social hosts by Civil Code section 1714, subdivision (c) precluded plaintiff from stating a claim against defendants. Additionally, because plaintiff had not shown the court how he could amend his complaint to "allege conduct against Defendants that is not alcohol induced," the court did not give plaintiff another opportunity to amend his complaint.⁴ After judgment was entered for defendants, this appeal followed.

⁴ The court additionally found that the class allegations in the SAC showed "numerous defects" including that the purported subclasses were "unascertainable" and that individual issues would predominate over issues that can be established on a class-wide basis. While the propriety of this ruling has been briefed by the parties on appeal, we do not address these arguments in this opinion. Given our conclusion that defendants cannot be held liable for any of the causes of action alleged in plaintiff's SAC based on statutory immunity, and the viability of any new amended complaint is uncertain, any discussion of the propriety of plaintiff's class allegations is unnecessary to our resolution of this case and would be dicta.

III. DISCUSSION

A. Clarification of Issues Before this Court and Standard of Review

We first note that plaintiff has significantly narrowed the issues on appeal by abandoning any argument that the trial court erred in dismissing his causes of action for negligence and unfair competition. Therefore, we affirm the trial court's judgment of dismissal with respect to these legal theories. Instead, on appeal, plaintiff seeks to impose civil liability on defendants based solely on a nuisance theory. Under his nuisance theory, plaintiff seeks "a permanent injunction abating the complained-of nuisance activity" as well as general and special damages.⁵ Narrowing the issues even further, in plaintiff's reply brief he announces that his claim for nuisance damages on behalf of the purported class has been dropped. Therefore, plaintiff seeks only individual damages based on his concession that because of "the uniqueness of each property owner's damages in nuisance cases," individual issues would predominate over issues common to the class. Consequently, our task on appeal has been simplified to reviewing the trial court's conclusion that plaintiff cannot maintain his cause of action for nuisance, which seeks injunctive relief and individual damages, because it is barred as a matter of law.

Preliminarily, we clarify the standard of review. On appeal from an order of dismissal entered after the trial court has sustained a demurrer without leave to amend, the appellate court employs two separate standards of review on appeal. (*G. L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1091 (*Mezzetta*)). The first

⁵ On July 11, 2012, this court granted a request for judicial notice of various pleadings and documents in an unrelated lawsuit that were submitted by defendants Association of the Lambda Chapter of Chi Phi and Lambda Chapter of Chi Phi Fraternity. (Order, Ruvolo, P.J.) These materials purportedly have relevance to the scope of injunctive relief requested by plaintiff. In the order granting judicial notice, it was indicated that the relevance of the submitted materials would be decided along with the issues on appeal. We have reviewed these material and find none of them to be relevant to the dispositive issues on appeal.

question is whether there is any defect in the complaint in the first place. Therefore, the appellate court reviews the complaint de novo to determine whether it contains sufficient facts to state a cause of action as a matter of law. (*Id.* at p. 1091; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790 (*Montclair*)). “A motion for judgment on the pleadings is equivalent to a demurrer and is governed by the same de novo standard of review. [Citations.]” (*Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672.) In analyzing the complaint, the Court of Appeal gives the complaint a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded as well as any facts which may be properly judicially noticed. (*Mezzetta*, at p. 1091; *Aubry*, *supra*, 2 Cal.4th at p. 967.)

Where the trial court has sustained a demurrer without leave to amend, the second question for the appellate court, is whether the trial court abused its discretion in doing so. (*Mezzetta*, *supra*, 78 Cal.App.4th at p. 1091; *Aubry*, *supra*, 2 Cal.4th at p. 967.) The trial court’s order of dismissal following the sustaining of a demurrer without leave to amend must be reversed if there is a reasonable possibility that any defect identified by the defendant can be cured by amendment. (*Aubry*, at p. 967; *Mezzetta*, at pp. 1091-1092; *Terhell v. American Commonwealth Associates* (1985) 172 Cal.App.3d 434, 438.)

The issues raised in this appeal turn upon the meaning and scope of Civil Code section 1714, subdivision (c), and related statutes governing social host liability in California, a purely legal question calling for the independent standard of review. (*Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317, 1323 (*Community Water Coalition*); *San Miguel Consolidated Fire Protection Dist. v. Davis* (1994) 25 Cal.App.4th 134, 146.) We conduct that review pursuant to settled rules of statutory construction.

“The fundamental goal of statutory construction is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining that intent we first look to the words of the statute, giving the language its usual, ordinary meaning. We construe the words of the statute in context, keeping in mind the statutory purpose.

Statutes or statutory sections relating to the same subject must be harmonized to the extent possible.” (*Community Water Coalition, supra*, 200 Cal.App.4th at p. 1323.)

B. Statutory Scheme Governing Social Host Liability in California

California has had an erratic history concerning liability for injuries incurred as a consequence of a social host furnishing alcohol to his or her guests. Many courts have discussed this history in detail. (See, e.g., *Bass, supra*, 177 Cal.App.3d at pp. 132-134; *Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 599-601; *Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1000-1005 (*Rogers*); *Hernandez v. Modesto Portuguese Penecost Assn.* (1995) 40 Cal.App.4th 1274, 1280-1281 (*Hernandez*)). Generally, in 1978 the Legislature made dramatic changes to the tort liability for those who provide alcoholic beverages in a social setting—granting the furnishers of alcoholic beverages “sweeping civil immunity” (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 724 (*Strang*)) and imposing “sole and exclusive liability upon the consumer of alcoholic beverages” for any injury resulting from the consumer’s intoxication. (*Cory v. Shierloh* (1981) 29 Cal.3d 430, 440 (*Cory*)). In that year the Legislature added subdivision (c) to Civil Code section 1714, which provides: “[N]o 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.” Similar language was adopted in Business and Professions Code section 25602, subdivision (b), providing immunity from civil liability for selling, serving or furnishing alcoholic beverages to an obviously intoxicated person.⁶

⁶ Business and Professions Code section 25602, subdivision (a), provides: “Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.” Subdivision (b) to Business and Professions Code section 25602, states: “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.”

The Legislature adopted language in both Civil Code section 1714 and Business and Professions Code section 25602 directing that “the consumption of alcoholic beverages rather than the serving of alcoholic beverages” is “the proximate cause of injuries inflicted upon another by an intoxicated person.” (Bus. & Prof. Code, § 25602, subd. (c); Civ. Code, § 1714, subd. (b).)

While enacting this broad immunity, the 1978 legislation carefully carved out a single exception for one type of case. As originally enacted, Business and Professions Code section 25602.1 stated that a vendor licensed to sell alcohol may be held liable for injuries caused by furnishing alcohol to an obviously intoxicated minor. (See *Zieff v. Weinstein* (1987) 191 Cal.App.3d 243, 248.) However, Business and Professions Code section 25602.1 was amended in 1986, and a civil action may now be maintained against persons selling liquor to an obviously intoxicated minor who are licensed or required to be licensed to sell liquor, persons authorized to sell liquor at certain federal venues, or any other person who sells liquor.⁷ (See *Ruiz v. Safeway, Inc.* (2012) 209 Cal.App.4th 1455; *Baker v. Sudo* (1987) 194 Cal.App.3d 936, 943-946 (*Baker*) [1986 amendments were not retroactive].)

In summarizing the legislative intent in passing Civil Code section 1714 and Business and Professions Code section 25602, the Court of Appeal in *Rogers, supra*, 160 Cal.App.3d 997, found that the various versions of the Senate bills reflect the “Legislature’s intent to eliminate liability for all providers of alcoholic beverages toward persons injured or killed by intoxicated consumers of those beverages, except in the case of licensed vendors who furnish alcohol to obviously intoxicated minors.” (*Id.* at

⁷ Business and Professions Code section 25602.1 now reads: “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 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.”

p. 1003.) “By declaring that the *consumption* of alcohol and *not the sale or furnishing thereof* is the proximate cause of injury inflicted by intoxicated persons, except for sales by licensed vendors to obviously intoxicated minors, the Legislature has redefined these torts, which is within its prerogative. [Citation.]” (*Id.* at p. 1004, original italics.)

Our Supreme Court reluctantly upheld the Legislature’s grant of civil immunity against constitutional attack in *Cory, supra*, 29 Cal.3d 430. The court acknowledged: “It is well settled that the Legislature possesses a broad authority both to establish and to abolish tort causes of action.” (*Id.* at p. 439.) Therefore, “notwithstanding the clear documentation of the appalling nature of the nationwide drunk driving problem, the Legislature with the Governor’s approval enacted legislation which was expressly designed to ‘abrogate’ ” prior decisions which found licensees as well as social hosts could be held liable for consequences of serving alcoholic beverages. (*Id.* at p. 435.) The court concluded the social-host immunity statutes were founded on a rational basis and were reasonably related to a legitimate state purpose. (*Id.* at pp. 440-441.)

Since 1978, social host immunity has been extended to the owners of premises where alcohol is consumed (*Leong v. San Francisco Parking, Inc.* (1991) 235 Cal.App.3d 827, 832-834; see also *Hernandez, supra*, 40 Cal.App.4th at pp. 1282-1283; *Elizarraras v. L.A. Private Security Services, Inc.* (2003) 108 Cal.App.4th 237, 242-243 [immunity extends to restaurant’s private security guard service].) Furthermore, social host immunity from the consequences of furnishing alcohol has been extended to the alleged failure to supervise individuals at social events who drink alcohol. Thus, courts have held that “to the extent plaintiff’s theory of liability rests on defendants’ failure to supervise their guests to whom they had furnished alcohol, defendants are shielded by immunity. [Citation.]” (*Biles v. Richter* (1988) 206 Cal.App.3d 325, 331 (*Biles*)). Courts have pointed out that if the “failure to supervise” theory of liability was enough to circumvent the social host immunity statutes, the immunity would be “seriously eroded” because “the duty of supervision is premised upon the need to look after those whose coordination and judgment have been adversely affected by the consumption of alcohol. If allowed, the duty would appear to exist in many if not most cases where alcohol is

furnished by social hosts.” (*Id.* at p. 331; see also *Zieff v. Weinstein, supra*, 191 Cal.App.3d at pp. 249-250; *DeBolt v. Kragen Auto Supply, Inc.* (1986) 182 Cal.App.3d 269, 274-275 (*DeBolt*).)

Most importantly, a cause of action for nuisance has been specifically recognized by our Supreme Court as a tort barred by social-host immunity statutes. In *Cory, supra*, 29 Cal.3d 430, our Supreme Court considered a nuisance cause of action in which it was alleged that the “use and occupancy of the premises constituted a nuisance, in that [the defendant] permitted thereon the unlicensed and unlawful sale and furnishing of alcoholic beverages to minors and others” (*Id.* at p. 433.) The Supreme Court rejected the plaintiff’s argument that his nuisance theory of recovery survived the enactment of the social-host immunity statutes. The Supreme Court agreed with the trial court’s conclusion that “the 1978 amendments were applicable to the sale or furnishing of alcoholic beverages in violation of licensing statutes, *whether or not such acts also constituted a nuisance.*” (*Id.* at p. 436, italics added.)

Consequently, by passing statutes such as Civil Code section 1714, subdivision (c) and Business and Professions Code section 25602, subdivision (b), the Legislature has statutorily immunized social hosts who furnish alcoholic beverages to their guests from liability for any injuries suffered by third parties due to the tortious actions of their intoxicated guests. Therefore, we agree with the trial court that insofar as plaintiff’s cause of action for nuisance sought liability because “Defendants allowed for the provision of alcohol and failed to adequately monitor the resulting behavior,” it has been abrogated by legislative action.

C. Exemption from Statutory Immunity for Injunctive Relief

We also reject an argument, raised for the first time by plaintiff on appeal, claiming that injunctive relief falls outside the immunity conferred on defendants by Civil Code section 1714, subdivision (c). Plaintiff relies on the statutory language, indicating that “[n]o social host who furnishes alcoholic beverages to any person may be held *legally accountable for damages* suffered by that person” (Italics added.) Seizing on the italicized language, plaintiff claims that “[b]y its express terms, this statute bars

only awards of *damages*. It says nothing barring an *injunction*.” Plaintiff goes on to argue that “[d]amages—not injunctive relief—are the target of this subsection.”

By making this argument, plaintiff encourages us to read the plain words of Civil Code section 1714, subdivision (c) to mean something other than what it actually says. The statutory provision relied upon by plaintiff immunizes a social host “who furnishes alcoholic beverages to *any person*” from legal liability “for damages suffered by *that person*.” (Italics added.) That phrase clearly refers to the situation where a social guest is suing the person who furnished the guest alcohol for damages the guest suffered as a result of his or her own intoxication.

The foregoing situation is distinguished by the statute from circumstances like this case, in which tort liability is being pursued by a *third person* based on injuries inflicted on the third person’s property by the intoxicated guest. This latter situation is expressly addressed in a subsequent portion of Civil Code section 1714, subdivision (c), which immunizes a social host whose guest becomes intoxicated “for *any injury to the person or property of, any third person*, resulting from the consumption of those beverages.” (See *Cory, supra*, 29 Cal.3d at p. 437 [noting the distinction where intoxicated guests have injured themselves rather than third parties].) Therefore, while the statute immunizes the social host from liability for any claim for “damages” made by the intoxicated guest, it more broadly immunizes the host from liability for any “injury” to the person or property of a third party.

We also note that a cause of action for nuisance must allege proximate causation, even when a plaintiff seeks only injunctive relief. (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 987-988.) As we have already noted, where the nuisance claim is based on injuries caused by intoxicated persons, the issue of causation is specifically addressed by Civil Code section 1714, subdivision (b), declaring that the voluntary “consumption of alcoholic beverages” rather than the “furnishing of alcoholic beverages . . . is the proximate cause of injuries inflicted upon another by an intoxicated person.” (See also Bus. & Prof. Code, § 25602, subd. (c).)

By adopting this language, the Legislature has signaled its intent to declare, as a matter of law, that the act of the social host in furnishing alcohol is not the proximate cause of injury to third parties. Regarding this point, our Supreme Court has stated, “the Legislature abolished tort liability against the furnisher of alcoholic beverages except in only one situation, namely, [a licensee] providing alcohol to an obviously intoxicated minor. *No other exceptions to this immunity exist.*” (*Strang, supra*, 37 Cal.3d at p. 728, italics added.)

We do not read this holding, or any other subsequent holding interpreting the immunity granted to social hosts, to indicate that the form of relief sought by a plaintiff (injunctive or monetary) dictates whether or not the immunity applies. (*Bass, supra*, 177 Cal.App.3d at p. 132.) Instead, as previously noted, courts have uniformly held that in the absence of an exception granted by the Legislature, the immunity from tort liability granted by the social-host immunity statutes is total and absolute. (*Strang, supra*, 37 Cal.3d at p. 728; see also *Hepe v. Paknad* (1988) 199 Cal.App.3d 412, 418 [in *Strang*, our Supreme Court “repudiate[ed] the idea that courts may continue to create implied exceptions to the immunity statutes”].)

Additionally, plaintiff provides no explanation why the Legislature would adopt differential treatment for lawsuits seeking injunctive relief as opposed to monetary damages. In pondering this question, we fail to see how creating a distinction between monetary and injunctive relief would bear a substantial and rational relationship to the Legislature’s purpose in enacting the social-host immunity statutes—namely, the intent to grant social hosts “broad statutory immunity against civil liability” arising out of the furnishing of alcohol (*Bass, supra*, 177 Cal.App.3d at p. 132), and instead imposing “sole and exclusive liability upon the consumer[s] of alcoholic beverages” when they engage in tortious conduct as a result of their alcohol consumption (*Cory, supra*, 29 Cal.3d at p. 440). In this regard, we agree with defendants’ observation that to create an exception from immunity for lawsuits seeking injunctive relief “would create the anomaly of a plaintiff being unable to sue for damages but nevertheless enjoining the very conduct the immunity protects.” For each and all of the foregoing reasons, we reject plaintiff’s

proposed interpretation of Civil Code section 1714, subdivision (c) and hold that the statute applies to claims for injunctive relief.

D. The Trial Court Properly Sustained the Demurrer to Plaintiff’s Nuisance Claim but Leave to Amend Should Be Granted

Having found that the social-host immunity statutes apply in this case, the initial question is whether plaintiff has stated a claim for nuisance in his SAC. As to that question, “our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citations.]” (*Montclair, supra*, 76 Cal.App.4th at p. 790.) In analyzing the complaint, “the allegations of the complaint must be read in the light most favorable to the plaintiff and liberally construed with a view to attaining substantial justice among the parties. [Citations.]” (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557.)

In granting defendants’ demurrer without leave to amend, the trial court rejected plaintiff’s attempt to couch defendants’ liability in terms separate and apart from furnishing alcohol. While conceding that some of plaintiff’s causes of action alleged behavior that was not directly alcohol related, for example, the improper disposal of wastes and creation of excessive noise, the trial court nevertheless observed that “each cause of action incorporates by reference the earlier paragraphs setting forth the offensive behavior as being alcohol induced.” Consequently, the trial court concluded that plaintiff could not escape social host immunity by recharacterizing defendants’ fault as something other than furnishing alcohol because “the essence of all of Plaintiff’s claims is that Defendants allowed for the provision of alcohol and failed to adequately monitor the resulting behavior.”

Like the trial court, this court cannot simply disregard the many references throughout plaintiff’s SAC to defendants providing the setting and atmosphere for social events which support “excessive alcohol consumption, binge drinking, alcohol consumption by minors, [and] public drunkenness,” which plaintiff claims results in “vandalism, interpersonal and group violence, and disregard for the property rights, safety, and well-being and comfort of neighbors and passers-by.” Consequently, the

heart of plaintiff's allegations is that defendants failed to monitor and regulate excessive drinking by those attending fraternity-sponsored social events, and then failed to act to safeguard plaintiff and his property from the actions of the drunken partygoers.

But courts have repeatedly held that "to the extent plaintiff's theory of liability rests on defendants' failure to supervise their guests to whom they had furnished alcohol, defendants are shielded by immunity." (*Biles, supra*, 206 Cal.App.3d at p. 331; see also *DeBolt, supra*, 182 Cal.App.3d at pp. 274-275.) Consequently, plaintiff's claims, as currently alleged in the SAC, are squarely within the social-host immunity statutes. (Civ. Code, § 1714, subd. (b); Bus. & Prof. Code, § 25602, subd. (c).)

The next issue we need to decide is whether plaintiff has demonstrated a "reasonable possibility" that he can amend his public and private nuisance claims to state viable causes of action. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 (*Rakestraw*)). The prevailing law in California overwhelmingly favors the granting of leave to amend a complaint. Our Supreme Court has discussed the basic principles permitting amendments in the following terms: "'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]" ' [Citations.] This abuse of discretion is reviewable on appeal 'even in the absence of a request for leave to amend' [citation], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend. [Citation.]" (*Aubry, supra*, 2 Cal.4th at pp. 970-971; see Code Civ. Proc., § 472c, subd. (a).) The plaintiff bears the burden of proving there is a reasonable possibility of amendment, and may make this showing for the first time on appeal. (*Rakestraw*, at pp. 43-44.)

On appeal, plaintiff insists that the "the *gravamen* of the SAC is nuisance, not alcohol." (Fn. omitted.) Looking at the allegations in the SAC, he emphasizes that "the 'universal common denominator' of [his] damages is not the provision of alcohol, but 'late night excessive noise,' littering, projectiles, illegal behavior, unsanitary conditions

and the like—from *whatever* source: alcohol, youthful exuberance, or anything else.” (Original italics.) He claims that if given the chance, he “can prove his nuisance claim at trial without ever mentioning the word ‘alcohol.’ ”

In light of the general rule of liberality in permitting amendments to a complaint, we find these allegations are minimally sufficient at the pleading stage to suggest that there is a “reasonable possibility” that plaintiff can amend his complaint to state sufficient facts constituting a nuisance. (*Aubry, supra*, 2 Cal.4th at pp. 970-971.)

Plaintiff’s SAC contains causes of action for both a public and private nuisance. (See Civ. Code, §§ 3479, 3480.) “ ‘The statutory definition of nuisance appears to be broad enough to encompass almost every conceivable type of interference with the enjoyment or use of land or property.’ [Citations.]” (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1136.) Plaintiff has alleged that he and his fellow residents have been “deprived of the quiet and secure enjoyment of their homes,” including diminution in value, based on the “wrongful actions” of the defendants. Stripped of the many reference to the consumption or furnishing of alcohol, plaintiff’s nuisance claims contain allegations of excessive noise, particularly between the hours of 11:00 p.m. and 7:00 a.m.; setting off fireworks and shooting projectiles; dumping and excessive littering; and failure to comply with state laws and City of Berkeley ordinances.

Aggravation caused by blasting noise and other activities that create interferences to the use and enjoyment of nearby property—in theory at least—presents a quintessential nuisance case. (See, e.g., *Farmy v. College Housing, Inc.* (1975) 48 Cal.App.3d 166, 169 (*Farmy*) [nuisance action brought by neighbor against adjacent student housing complex alleging, among other things, amplified music, student throwing “beer cans, rolls of toilet paper, rocks and all sorts of trash out of the windows” and excessive traffic].) But, of course, just because plaintiff makes these allegations does not mean that he has proven nuisance violations for which defendants are liable. (*Id.* at pp. 177-178 [trial court found “there is no injunction in respect to the loud noises of students or their guests, the parking of cars, and there is a finding that they ‘do not at the present time constitute a nuisance for which . . .’ [defendants] are responsible”].) As the

Farmy court pointed out, “[t]he injunction implicitly recognizes as a matter of law that [defendants] had no vicarious responsibility for student misconduct . . . and there is no dispute as to the efforts continuously made by [defendants] to eliminate it.” (*Id.* at p. 180, fn. 6.)

However, because we are not prepared to say at this juncture that any amendment to plaintiff’s nuisance claims “would be futile,” plaintiff should be allowed to once again amend his complaint. (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685.) In so holding, we do not express any opinion concerning whether plaintiff will be successful in restating his causes of action for public and private nuisance. Since the trial court has not ruled on the merits, we believe that any discussion of the viability of such claims would constitute an advisory opinion. (*Aubrey, supra*, 2 Cal.4th at pp. 971-972.)

E. New Developments

As we alluded to in footnote 2, we have focused on the law as it existed when plaintiff filed his complaint, rather than on the law as it is continuing to evolve through subsequent developments. (See *Baker, supra*, 194 Cal.App.3d at p. 941 [court properly focused on statutes in effect at time of cause of action accrued].) However, we note there have been several recent developments, on both the legislative and judicial fronts, with respect to civil liability for furnishing alcohol to minors.

When the trial court issued its decision on November 10, 2010, it was cognizant of the fact that the Legislature had recently passed an amendment to Civil Code section 1714. The 2010 amendment provides that despite the immunity conferred by Civil Code section 1714, subdivision (c), nothing shall preclude a claim against an “adult who knowingly furnishes alcoholic beverages at his or her residence to a person under 21 years of age, in which case . . . the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death.” (Civ. Code, § 1714, subd. (d), added by Stats. 2010, ch. 154, § 1.)⁸ However, as nonurgency legislation, this

⁸ A subdivision was added in 2011 providing: “A claim under this subdivision may be brought by, or on behalf of, the person under 21 years of age or by a person who was harmed by the person under 21 years of age.” (Civ. Code, § 1714, subd. (d)(2).)

amendment was not scheduled to take effect until January 1, 2011. (See Cal. Const., art. IV, § 8, subd. (c)(1).) When defendants' demurrer was argued on November 10, 2010, plaintiff requested additional time to have an opportunity to plead a cause of action under this new amendment. However, the court denied the request and focused on the law existing at the time plaintiff filed his complaint.

The court's ruling was in harmony with the maxim that “ ‘[g]enerally, statutes operate prospectively only.’ [Citations.] ‘[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly For that reason, the “principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” ’ [Citations.] ‘The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact.’ [Citation.]” (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475.)

Plaintiff claims on appeal that “even if the trial court's ruling based upon the *pre-2011* version of § 1714 were correct, it would not be correct as to future conduct.” However, as noted again in footnote 2, we express no opinion at this time as to whether plaintiff can assert a cause of action under the new amendment to Civil Code section 1714.

We also note that there is a case currently pending before our Supreme Court, *Ennabe v. Manosa* (S189577) (*Ennabe*), which presents the question of whether a social host loses immunity under Civil Code section 1714, subdivision (c), by collecting money from underage guests for a common fund in order to help defray the cost of purchasing alcoholic beverages. It is also anticipated the court will address the issue of whether, under such circumstances, there is a sale of alcoholic beverages within the meaning of Business and Professions Code section 25602.1, exempting from social host immunity any “person who sells, or causes to be sold, any alcoholic beverage” to an obviously

intoxicated minor.⁹ Plaintiff asserts that if the California Supreme Court finds liability in the situation described in *Ennabe*, liability is implicated in this case as well because there are occasions where defendant fraternities will charge nonmembers an entry fee for access to fraternity parties in which alcohol is made freely available, regardless of the partygoers' age or state of intoxication. Depending on the outcome of *Ennabe*, there is a possibility that plaintiff may be able to state a new theory of liability against defendants.

IV.

DISPOSITION

We affirm the trial court's dismissal of plaintiff's causes of action for negligence and unfair competition. However, we reverse the order of dismissal without leave to amend to plaintiff's causes of action for public and private nuisance and remand with

⁹ The Supreme Court's Web site states sets out the preliminary framing of the issues in *Ennabe*: "This case presents the following issues: (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 an 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)?"

(<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1966909&doc_no=S189577> [as of Jan. 17, 2013].)

directions to grant plaintiff leave to amend his complaint. Both plaintiff and defendants are to bear their own costs on appeal.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.