IN THE SUPREME COURT FOR THE STATE OF OREGON

CASEY J. DECKARD,

Plaintiff – Appellant – Respondent on Review,

v.

DIANA L. BUNCH,

Defendant,

and

JEFFREY N. KING, as Personal Representative of the Estate of Roland King, Deceased,

Defendant – Respondent – Petitioner on Review.

Circuit Court Case No. 102298
Court of Appeals Case No. A151792
Supreme Court Case No. S062948

Appeal from the Final Judgment of the Circuit Court for Lincoln County
dated June 12, 2012
Honorable Charles P. Littlehales, Judge

RESPONDENT DECKARD'S ANSWERING BRIEF

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RESPONDENT DECKARD'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

After being seriously injured in an automobile accident caused by a drunk driver, plaintiff Casey J. Deckard ("Deckard") filed this lawsuit alleging negligence against both the driver, defendant Diana Bunch ("Bunch"), and her social host, Roland King, who had provided alcohol to Bunch. Deckard also brought a statutory claim[1] against Roland King pursuant to ORS 471.565. After Roland King's death on July 29, 2010, Deckard substituted the personal representative of Roland King's estate, Jeffrey N. King, as the defendant for his claims against Roland King (hereinafter "King").

King filed a motion to dismiss the statutory liability claim pursuant to ORCP 21A, which the trial court granted. Deckard proceeded to trial against Bunch and King on his common law negligence claim. The jury awarded Deckard $4,112,320.00 in damages against Bunch but returned a defense verdict in favor of King (TCF 234). Deckard sought to reverse the trial court's dismissal of his statutory liability claim pursuant to ORS 471.565, which the

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[1] In his complaint, Deckard styled the claim as a "statutory tort." (TCF 9.) As King notes, the preferred term is now "statutory liability." White Br at 2 n.2; *see also Doyle v. City of Medford*, 356 Or 336, 344 n.6, 337 P2d 797 (2014) (en banc).

Court of Appeals did. King now petitions this court to reverse the Court of Appeals' decision.

B. Nature of the Judgment

The nature of the judgment is the Court of Appeals' decision reversing the trial court's order granting King's Rule 21 Motion to Dismiss. *See Deckard v. Bunch*, 267 Or App 41, 340 P3d 655 (2014),

C. Basis of Appellate Jurisdiction

Appellate jurisdiction is based on ORS 19.205(1) and ORS 19.270(1).

D. Effective Date for Appellate Purposes

The trial court's Memorandum Opinion and Order dismissing Deckard's statutory claim was signed on March 19, 2011 and entered on March 21, 2011. After trial on Deckard's remaining claim for common law negligence, the trial court's General Judgment and Money Award was entered on June 12, 2012. Deckard's Notice of Appeal was filed and served on June 21, 2012.

The Court of Appeals reversed the trial court on November 19, 2014. King submitted a petition for review to this court on January 21, 2015, which this court allowed on April 9, 2015.

E. Question Presented on Appeal

Does ORS 471.565(2) create a statutory right of action against a commercial or social host who serves alcohol to a visibly intoxicated guest when that guest then drives drunk and injures an innocent third party?

F. Summary of Argument

ORS 471.565, provides a statutory action to an injured motorist against a commercial server or social host who serves alcohol to a visibly intoxicated person. When it enacted the statute's predecessor in 1979, the legislature intended to provide such an action, and ORS 471.565 contemplates statutory liability. Moreover, the Oregon Supreme Court has consistently interpreted ORS 471.565, or its predecessors, as providing a statutory action to protect third parties who are injured by drunk drivers.

G. Statement of Facts

The facts are taken from the First Amended Complaint. (TCF 9.) On November 4, 2009, an inebriated Bunch drove northbound with her headlights off on Highway 101 in South Beach, Oregon. Her car crossed the center lane and slammed head-on into Deckard's Geo Metro. The crash fractured Deckard's sternum and crushed both of his ankles, his right wrist and his shoulder, bruised his lungs, and injured his spine. Shortly before the crash, Bunch had been drinking at the home of Roland King.

Deckard sued Bunch for negligence and also brought two claims against King, one for common law negligence and one for statutory liability for providing alcohol to a visibly-intoxicated person, in violation of ORS 471.565.

II. ASSIGNMENT OF ERROR

A. Preservation of Error

At the Court of Appeals, Deckard assigned as error the trial court's dismissal of his statutory claim pursuant to ORS 471.565. Deckard preserved his claims regarding this error by filing a legal pretrial memorandum (TCF 16) and by argument before the trial court (ER-3 – 22.)

B. Standard of Review

When reviewing a trial court's dismissal of a claim pursuant to ORCP 21A(8), this court "accept[s] as true all of the allegations and give[s] the nonmoving party the benefit of all favorable inferences that can be drawn from those allegations." *American Fed. Teachers v. Oregon Taxpayers United*, 345 Or 1, 18, 189 P3d 9 (2008). The court determines whether the allegations in Deckard's pleading, taken together with any reasonable inferences drawn from those allegations, state a claim as a matter of law. *State ex rel. Glode v. Branford*, 149 Or App 562, 565, 945 P2d 1058 (1997), *rev den*, 326 Or 389, 952 P2d 62 (1998).

III. ARGUMENT

The essence of King's argument is that ORS 471.565 does not create statutory liability because the legislature did not expressly state, in affirmative terms, that the statute creates a cause of action. This argument fails for several reasons, most notably that the legislature is not so limited in how it crafts

statutory language, and this court has never required such an explicit standard. King also argues that this court's statement in *Chartrand v. Coos Bay Tavern, Inc.*, 298 Or 689, 696 P2d 513 (1985), that the statute creates liability is merely "*dictum*" and therefore lacks precedential value, but in fact, the statute's legislative history supports *Chartrand*, which both the legislature and this court have preserved for the past thirty years.

A. Legal Standard to Determine Whether the Legislature Created Statutory Liability

"Statutory liability arises when a statute either expressly *or impliedly* creates a private right of action for the violation of a statutory duty." *Doyle*, 356 Or at 344 (emphasis added) (citing *Nearing v. Weaver*, 295 Or 702, 707, 670 P2d 137 (1983) (en banc)). Whether the statute does provide for statutory liability is a question for this court. *Scovill v. City of Astoria*, 324 Or 159, 170, 921 P2d 1312 (1996). When considering that question, the court follows the guidelines for ascertaining legislative intent set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993), *superseded by statute as stated in State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (en banc). The "best evidence" of the legislature's intent remains the "text *and context*" of the statute. *Scovill*, 324 Or at 166 (emphasis added). This court "has generally focused on two factors" to determine the legislature's intent: "(1) whether the statute refers to civil liability in some way, …; and (2) whether the statute provides no express remedy, civil or otherwise, for its violation and, therefore,

there would be no remedy of any sort unless the court determined that the legislature impliedly created one or the court itself provided one." *Doyle*, 336 Or at 345 – 46 (citing *Chartrand*, 298 Or at 696).

B. The Statute's Text and Context Reflect the Legislature's Intent to Establish Statutory Liability

Both the text and context of ORS 471.565 indicate that the legislature intended to create statutory liability for social hosts who serve alcohol to visibly intoxicated guests. The statute itself contemplates liability twice, albeit in reverse form, both italicized below:

> (1) A patron or guest who voluntarily consumes alcoholic beverages served by a person licensed by the Oregon Liquor Control Commission, a person holding a permit issued by the commission or a social host *does not have a cause of action, based on statute or common law*, against the person serving the alcoholic beverages, even though the alcoholic beverages are served to the patron or guest while the patron or guest is visibly intoxicated. The provisions of this subsection apply only to claims for relief based on injury, death or damages caused by intoxication and do not apply to claims for relief based on injury, death or damages caused by negligent or intentional acts other than the service of alcoholic beverages to a visibly intoxicated patron or guest.
>
> (2) A person licensed by the Oregon Liquor Control Commission, person holding a permit issued by the commission or social host is not *liable for damages* caused by intoxicated patrons or guests unless the plaintiff proves by clear and convincing evidence that:
>
> (a) The licensee, permittee or social host served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated; and
>
> (b) The plaintiff did not substantially contribute to the intoxication of the patron or guest . . . .

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ORS 471.565 (emphases added).

Subsection 2 applies to cases like this one in which an innocent plaintiff is injured by a drunk driver, and it anticipates circumstances where hosts *will* be "liable for damages" by setting out the criteria for when they will not. ORS 471.565(2). King suggests that this language implies that the legislature did not intend to create statutory liability. (White Br at 7 – 8.) However, this court recognized in *Chartrand* that such "reverse language" demonstrates that the legislature intended "that a tavern owner will be held liable for the acts of a person who has been served alcohol while visibly intoxicated." *Chartrand*, 298 Or at 696. Nor is *Chartrand* the only instance in which this court has held that a statute may imply liability by "negative implication":

> As noted, above, in both *Nearing* and *Scovill,* this court looked to contextual statutes that provided for immunity from civil liability for acts *pursuant* to the statutes and that, in so doing, demonstrated that the legislature had contemplated civil liability for *failures* to act pursuant to the statutes. Such reasoning by negative implication frequently has been a focal point of this court's statutory liability decisions. *See, e.g., Scovill,* 324 Or at 169, 921 P2d 1312; *Chartrand,* 298 Or at 695–96, 696 P2d 513; *Nearing,* 295 Or at 708–10, 670 P.2d 137; *see also* Forell, 77 Or L Rev at 503 ("[I]f the statute says that no liability exists in certain situations, by negative implication the statute may intend it to exist in other situations.").

Doyle, 356 Or at 357 n.10 (emphases in original). Therefore, contrary to King's assertion, there is nothing unusual in this statutory construction – "not-

liable-unless" – as a way to establish liability.[2] (White Br at 7 – 8.) ORS 471.565(2)'s text reflects the legislature's intent to create statutory liability for those who serve alcohol to visibly intoxicated persons. And, as this court has explained several times, the legislative history clarifies that such liability applies only when the plaintiff is hurt by a drunk driver.

The second indication that the legislature intended to create statutory liability comes from the context[3] of subsection 2, particularly when read in conjunction with subsection 1. Subsection 1, which bans all claims arising from a person's own voluntary intoxication, does not apply to Deckard's lawsuit. But subsection 1's language – that such a person "does not have a

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[2] King takes out of context this court's observations, in *Sager v. McClenden*, 296 Or 33, 39, 672 P2d 697 (1983), and *Gattman v. Favro*, 306 Or 11, 23 n.11, 757 P2d 402 (1988), that the "not-liable-unless" language limits, rather than expands liability. As this brief will discuss in greater detail, both *Sager* and *Gattman* involved plaintiffs who were outside the class of persons that ORS 471.565 (and its predecessors) were designed to protect: third-parties hurt by drunk drivers. *Sager* concerned a plaintiff who had injured himself while drunk and *Gattman* was a plaintiff who had been stabbed in a bar brawl. The "not-liable-unless" comments King refers to reflect this court's accurate assessment that the legislature did not intend to expand liability beyond what it had already anticipated to extend to those injured either by their own intoxication or other than in a drunk-driving accident. *See Sager*, 296 Or at 39 (noting that "the legislature intended no new claim for patrons injured off the premises by their own intoxication"); *Gattman*, 306 Or at 24 ("The entire legislative history is in terms of the protection of persons injured by inebriated motorists. The legislature never had in mind the protection of persons in the plaintiff's position from the type of conduct or harm alleged in this case.").

[3] Recall that both the text and context of a statute are the best evidence of the legislature's intent. *Scovill*, 324 Or at 166. A statute's context includes other provisions of the same statute and other related statutes. *PGE*, 317 Or at 611.

cause of action, *based on statute or common law*" – demonstrates that the legislature knows how to erase all doubt about whether statutory liability exists within the realm of serving alcohol to visibly intoxicated persons.

ORS 471.565(1) (emphasis added). Moreover, the fact that subsection 2 does not contain similar language suggests that the legislature intended to preserve both common law and statutory claims when a third-party's injury results from drunk driving. Perhaps not surprisingly, King ignores subsection 1's language, but he cannot avoid the fact that "use of a term in one section and not in another section of the same statute indicates a purposeful omission." *PGE*, 317 Or at 611 (citing *Emerald PUD v. PP & L,* 302 Or 256, 269, 729 P2d 552 (1986) (en banc)). The fact that the legislature did not expressly exclude statutory actions in subsection 2, after having just done so in subsection 1, indicates that it intended for plaintiffs meeting subsection 2's criteria to have both common law and statutory actions. [4]

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[4] King makes the puzzling assertion that ORS 471.565 "does not impose a duty on hosts *not* to serve visibly intoxicated guests;" instead, he claims that it is found in ORS 471.410(1) ("A person may not sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated."). (White Br at 9 n.4 (emphasis in original).) He then goes on to state that *Doyle* is inapposite in this situation because there "the court [was] asked to recognize a private right of action to enforce a duty created by a statute that does not itself create such a right." (*Id.*) Of course, King's initial premise is incorrect because *Doyle* itself recognized that "a private right of action may be created by legislative implication—just as this court concluded in … *Chartrand* [construing *former* ORS 30.950]." *Doyle*, 356 Or at 360. However, King is correct that this court need not resort to a *Doyle*-type inquiry to determine

C. ORS 471.565's Legislative History, as Consistently Construed by this Court, Demonstrates an Intent to Provide Statutory Liability

This court has considered the legislative history of ORS 471.565 (or its predecessors) several times, always concluding that it establishes a statutory action for injured motorists against social hosts (or licensees) who serve alcohol to a visibly intoxicated guest.

1. Pre-Statutory History

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whether, in the absence of "discernible legislative intent to create or deny a right of action, the court must then decide whether creating a common law right of action would be consistent with the statute …." *Id.* at 364. That is because this court has already spoken: the legislature did intend to create such a right to enforce ORS 471.565's duty.

As for ORS 471.410(1), this court held that its violation "should not constitute negligence as a matter of law in a civil action for damages against its violator." *Stachniewicz v. Mar-Cam Corp.*, 259 Or 583, 587, 488 P2d 436 (1971), *overruled in part on other grounds by Davis v. Billy's Con-Teena, Inc.*, 284 Or 351, 356 n.4, 587 P2d 75 (1978) (en banc); *see also Hawkins v. Conklin*, 307 Or 262, 265, 767 P2d 66 (1988) (applying *stare decisis* to hold that ORS 471.410(1) "is not an appropriate method for establishing negligence *per se*"). But, as one commentator noted, ORS 471.565 (*former* 30.950)

> is a very different kind of statute from ORS 471.410(1). First, this statute [ORS 30.950], while not expressly providing for a tort action, expressly refers to civil liability by the terms "[n]o licensee or permittee is liable for damages … unless … ." Second, no remedy, civil or otherwise, is expressly provided.

Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR L REV 497, 508 (1998). In other words, although both ORS 471.565 and 471.410(1) concern providing alcohol to visibly intoxicated persons, the scope of that duty—and whether its violation imposes liability—is different depending on the circumstances.

Before 1977, a third party injured by a drunk patron or guest had no recourse against the person who provided the alcohol, either in common law or under statute. First parties who were themselves injured as a result of drinking alcohol had an indirect means of recovery under a statute enacted in 1913 (known as the "Dram Shop Act"), which allowed the spouse, parent or child of an "intoxicated person or habitual drunkard" to bring an action on the "drunkard's" behalf against the person who had provided him the alcohol. *Former* ORS 30.730 (*repealed by* Or Laws 1979, ch 801, § 4); *see also Gattman*, 306 Or at 17 ("[T]he remedy under the Dram Shop Act was limited to the wife, husband, parent or child of the intoxicated person or habitual drunkard; it provided a remedy for loss of family support due to the injury or death of an intoxicated family member. The Dram Shop Act did not provide a remedy to a third party injured by an act of an intoxicated person.").

In *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or 632, 485 P2d 18 (1971) (en banc), the plaintiff brought a negligence claim against a person who had purchased alcohol for a fraternity party, alleging that he was liable for the injuries she suffered in an auto accident that occurred after the party, in a car driven by a person who had consumed alcohol at the party. Although this court declined to permit a common law negligence action under those circumstances, it acknowledged that "[t]here might be circumstances in which the host would have a duty to deny his guest further

access to alcohol," perhaps if the host had reason to know that the guest was "especially likely" to "do unreasonable things." *Wiener*, 258 Or at 639.

Six years later, in *Campbell v. Carpenter*, 279 Or 237, 566 P2d 893 (1977), this court for the first time recognized the viability of a negligence action by an injured motorist against the tavern owner who served alcohol to a visibly intoxicated patron who then drove drunk. *Campbell*, 279 Or at 243-44. One year after that, the court held that a plaintiff could bring a negligence *per se* claim against a tavern owner who sold a keg of beer to an underage minor, in violation of a statute making it unlawful to sell alcohol to someone "about whom there is any reasonable doubt of his having reached 21 years of age" without first checking his identification. *Davis*, 284 Or at 357.

2. The 1979 Legislation Was Intended to Protect a Class of Persons to Whom Servers Are Liable – Third Parties Injured By Drunk-Drivers

In response to the *Campbell* and *Davis* decisions, the Oregon Restaurant and Beverage Association and other commercial alcoholic beverage servers supported HB 3152 in the 1979 legislative session. After a series of amendments, this bill became ORS 30.950 and 30.955, the predecessor statutes to ORS 471.565:

> 30.950. No licensee or permittee is liable for damages incurred or caused by intoxicated patrons off the licensee's or permittee's business premises unless the licensee or permittee served or provided the patron alcoholic beverages when such patron was visibly intoxicated.

> 30.955. No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated.

Or Laws 1979, ch. 801, §§ 1 and 2.

The first case to interpret this statute concerned a "first party" claim on behalf of an inebriated patron who was injured after being served while visibly intoxicated, a circumstance never contemplated by the legislature when debating HB 3152. In *Sager v. McClenden*, *supra*, an intoxicated patron attempted to recover for injuries incurred in a drunken fall. The question presented was "whether … ORS 30.950 *authorizes a claim* by an intoxicated person against a liquor licensee for off premises injuries sustained by the intoxicated person who was served alcohol while visibly intoxicated." *Sager*, 296 Or at 35 (emphasis added). In ultimately determining that ORS 30.950 did not "authorize" a claim for a first-party (*i.e.*, intoxicated) plaintiff, the court carefully reviewed the statute's legislative history and concluded that "its purpose was to limit the liability of liquor licensees and permittees to third parties," a statement on which King heavily relies. *Id.* at 37. King believes that the context of the term "limit" means that the legislature intended to restrict any future claims against servers to only common law negligence actions. But that conclusion misreads both the court's language and the legislature's intent. Rather, the term "limit" refers to the legislature's intent to narrow the class of plaintiffs who can bring a claim against a server to third parties injured by

intoxicated patrons, a class which does not include those injured by their own inebriation:

> A thorough reading of the minutes of the committee hearings on HB 3152 *fails to reveal a single mention of creating a claim in favor of injured patrons*. Throughout the hearings, discussion centered *on licensees' liability to third parties*. We believe that if the legislature had intended to create a new claim, not available under the common law [such as a claim in favor of drunk patrons], there would have been some mention of it in the committee hearings. This is especially true of a type of claim as controversial as this one.

Id. at 39 (emphases added). King thus overreaches in arguing that "*Sager* held that *former* ORS 30.950 and 30.955, the predecessors to current ORS 471.565, were not intended to create new, statutory claims, but rather to limit the common law claims that had just been recognized in *Wiener*, *Campbell*, and *Davis*." (White Br at 18.) The actual holding was in fact much more limited: "[W]e hold that ORS 30.950 *does not create a claim in favor of intoxicated persons* injured off premises against liquor licensees who serve them when visibly intoxicated." *Sager*, 296 Or at 40 (emphasis added). In other words, the *Sager* court concluded only that ORS 30.950 did not "authorize" a claim for a first-party intoxicated plaintiff. But the court's close analysis of the statute's legislative history hinted at the type of claim *former* ORS 30.950 did "authorize," which – as the court explained two years later in *Chartrand*, is a statutory claim brought by a third party against a server who provides alcohol to a visibly intoxicated person.

It is undeniable that, during the 1979 legislative session, the restaurant and beverage industry *wanted* the legislature to lessen its liability to even third-parties, but "proposed legislation cannot be accepted as evidence of legislative intent." *Roberts v. Dep't of Revenue*, 10 Or Tax 448, 450, 1987 WL 15948 (1987). In any event, the legislature declined to enact everything the beverage industry wanted:[5]

> Section 1 of HB 3152, which, as modified, became ORS 30.950, was proposed to limit the holding in *Campbell*. As originally drafted, Section 1 provided that licensees would not be liable unless they were grossly negligent in serving visibly intoxicated patrons. *The gross negligence standard,*

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[5] This exchange, between House Committee Chairman Frohnmayer and Dave Dietz, a lobbyist for the Restaurants of Oregon, regarding the industry's desire to insert a gross negligence requirement, is instructive:

> Dave Dietz: * * * We think that to return a balance between a patron and a licensee or social hosts, there has got to be a presumption in favor of the licensee. Gross negligence is the presumption that most of the affected parties could agree to, and therefore we bring it to you with the gross negligence.
>
> Chairman Frohnmayer: Putting that aside for the moment, that's really part of my question: isn't it true that this doesn't merely restore the status quo ante, prior to the Supreme Court's decision, but it does in fact roll back the law as it has been understood for the last decade or so, to a point where third party liability is very difficult to obtain at all.
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> Dave Dietz: There's an argument that could be made that it rolls it back to much before the '78 decision, in *Campbell*. *Of course, that's exactly what we're attempting to do*. I think it takes it back very nearly to the 1971 decisions, of both *W[ie]ner* and [*Stachniewicz*], both of which spoke more to the issue of what the common law had at that point in time determined. * * *

HB 3152, House Jud. Comm., June 11, 1979 – 1:30 p.m., Tape 85 (App-8 – 9) (emphasis added).

> *however, was deleted from the bill in committee*. As finally approved, ORS 30.950 *codified* the holding in *Campbell*.

Sager, 296 Or at 38-39 (emphases added).[6] And the legislators themselves anticipated that statutory liability would result from enacting the bill, as illustrated by this comment from Representative Lombard regarding the portion of HB 3152 designed to overrule the *Davis* decision regarding negligence *per se* for service to minors:

> All I would say is, you know, I'm the one to look for a compromise, but all I'll say in the end is that even recognizing what our policies are it seems to be, it's [a] terrible and tenuous thin line *where we subject someone to statutory liability* or third party, solely on the basis of the judgement [*sic*] of whether or not there is reasonable doubt as [to] that individual's age.

HB 3152, House Jud. Comm., June 27, 1979, Tape 97 (App-25) (emphasis added). At the end of the day, the legislative history reveals that the beverage industry in 1979 may have settled for a "beachhead" position that might have limited *expansion* of alcohol liability beyond what had already been decided by

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[6] This court has noted this particular aspect of the statute's legislative history at least two other times. *See Chartrand*, 298 Or at 697 ("After the bill was amended by the House Judiciary Committee [by deleting reference to the gross negligence standard], *the purpose of the bill changed from restricting liability to expanding liability* to third persons, but not to the person served.") (emphasis added); *Gattman*, 306 Or at 23 ("The legislative history … establishes that although ORS 30.950 was proposed as a limitation on a tavern keeper's liability, it ended up (1) as a *legislative codification* of this court's decision in *Campbell* [which allowed third party actions against persons who serve alcohol to a visibly intoxicated person] …, and (2) as a legislative limitation of [*Davis v.*] *Billy's Con–Teena, Inc.*") (emphasis added).

the *Campbell* court, but it certainly does not stand for the proposition that *former* ORS 30.950 did not create a statutory cause of action. In fact, the opposite is true.

3. Case Law Confirms That ORS 471.565, and Its Predecessors, Established Statutory Liability for Third Parties Injured By Drunk Drivers

The seminal decision considering the impact of *former* ORS 30.950, the predecessor to ORS 471.565, was *Chartrand v. Coos Bay Tavern*, *supra.* *Chartrand* was an action brought by an injured motorist against a tavern owner who had served a visibly intoxicated patron who then left the tavern and drove her vehicle into a head-on collision with the plaintiff. The court upheld the Court of Appeals' determination that a jury instruction had been erroneous, and then noted that the plaintiff could proceed against the defendant under a theory of "statutory tort … in this case based on ORS 30.950." *Chartrand*, 298 Or at 695. Far from having "forgotten" (White Br at 18) what it had said in *Sager*, the court used its careful study of *former* ORS 30.950's legislative history in that case to inform its comments in *Chartrand*, a case—unlike *Sager*—brought by a plaintiff who was squarely in the class of persons about which the legislature was concerned: third-parties injured by a drunk driver. After noting that "the risk and the potential harm to the plaintiff have already been foreseen by the lawmaker," this court declared that the legislature had created a statutory tort "by stating, or implying in reverse language, that a tavern owner will be

held liable for the acts of a person who has been served alcoholic liquor while visibly intoxicated." *Chartrand*, 298 Or at 696.

Professor Forell explained that *former* ORS 30.950 contained two features that made it "more appropriate for courts to determine that the legislature intended an implied statutory tort[]: (1) the statute refers to civil liability in some way; and (2) the statute provides no express remedy, civil or otherwise." Forell, 77 OR L REV AT 509.[7] *Chartrand* therefore established that *former* ORS 30.950 created a statutory action for a third party injured by a drunk driver, a holding that has remained Oregon law for thirty years.

Chartrand undermines King's argument that statutory liability does not exist, forcing King to argue that the court's analysis was *dictum*. (White Br at 19.) Even if that is accurate, *Chartrand*'s logic has withstood the test of time:

> The fact that a prior construction amounts to *dictum* does not, by itself, mean that it was incorrect and without any force whatsoever. It merely means that we are not *required* to follow it as precedent. The prior construction, even if *dictum,* could have persuasive force because of the soundness of its reasoning.

Halperin v. Pitts, 352 Or 482, 494, 287 P3d 1069, 1076 (2012) (en banc) (emphasis in original). And there is no reason to fault the court's reasoning,

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[7] King calls out Professor Forell's earlier criticism of the *Chartrand* decision, to which this court itself later referred in *Gattman*, 306 Or at 24 n.12 (quoting Caroline Forell, *The Interrelationship of Statutes and Tort Actions*, 66 OR L REV 219, 267 (1987))). (White Br at 20.) Over time, however, Professor Forell's opinion appears to have changed to one that supports *Chartrand*.

which employed *Nearing*'s methodology[8] for determining whether the legislature intended to impose liability for a statute's violation and on this court's conclusion in *Sager* that "[a]fter the bill [HB 3152] was amended by the House Judiciary Committee, the bill the purpose of the bill changed from restricting liability to expanding liability to third persons, but not to the person served." *Chartrand*, 298 Or at 697 (citing *Sager*, 296 Or at 39). Deciding whether the legislature intended to create statutory liability through *former* ORS 30.950 may not have been necessary to determine *Chartrand*'s outcome, but the court's reasoning that it did was sound; more importantly, neither this court nor the legislature has ever disavowed it despite numerous opportunities.

Three years after *Chartrand*, the court decided *Gattman v. Favro*, *supra*, and again affirmed that *former* ORS 30.950 provided a statutory remedy but only for injuries caused by a drunk driver. In *Gattman*, the plaintiff was stabbed by a restaurant patron after the patron had left the premises. The plaintiff brought an action against the restaurant under *former* ORS 30.950, alleging that it had served the patron when he was visibly intoxicated. This court once again examined the legislative history behind the statute, which the

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[8] In *Nearing*, the court found that a law requiring police officers to arrest those who violated a domestic violence restraining order established a statutory duty independent from common law negligence for which the police officer could be held liable if he failed to enforce the law. That result was justified by the fact that "the risk, the harm and the potential plaintiff were all foreseen by the lawmaker." *Nearing*, 295 Or at 708 – 09.

Court of Appeals cogently summarized:

> Significantly, the *Gattman* decision indicated what statutory liability was, when it decided what it was not. The court explained that *former* ORS 30.950 was intended to protect only those plaintiffs injured in drunk-driving accidents. [] The court discerned that the legislature had not intended to create "licensee and permittee liability for *all actions*" in which an injured plaintiff could establish that a host had furnished a visibly intoxicated patron with alcohol. *Id.* (emphasis added). The court emphasized that, in discussing the bill, legislators focused exclusively on fact patterns involving "the context of automobile or traffic related injuries." [] Consistently with that legislative history, the court distinguished *Chartrand*. The court noted that "*Chartrand* involved a claim for injuries arising from the very risk with which the legislature was concerned, the intoxicated driver," whereas the plaintiff in *Gattman* was "not within the class of persons intended to be protected by the statute and the harm is not of a type intended to be protected against." []In that way, the court distinguished prospective plaintiffs who fell within the protection of the statute and, as a consequence, indicated that *former* ORS 30.950 provided a theory of recovery for those plaintiffs.

Deckard, 267 Or App at 47 (citations and footnote omitted).

True, the *Gattman* court referred to its pronouncement in *Chartrand* that "on remand, the plaintiff could proceed against the tavern owner on a statutory tort theory under ORS 30.950" as "dictum." *Gattman*, 306 Or at 23. However, in the next breath, the court said the following:

> *Chartrand* lends some support to the plaintiff's assertion that ORS 30.950 created a statutory tort in his favor. *Chartrand* involved a claim for injuries *arising from the very risk with which the legislature was concerned*, the intoxicated driver. *Sager* did not involve such a situation, and we refused to apply the statute. Nor do we in this case.

Id. at 23-24 (emphasis added). In other words, although *Gattman* court referred to *Chartrand*'s approval of a statutory tort as *dictum*, it also accepted that *former* ORS 30.950 created a statutory remedy for the class of persons the legislature intended to protect, *e.g.*, injured motorists harmed by drunk drivers.[9] The *Gattman* court simply held that the statutory action does not protect third parties whose injuries do not result from drunk-driving accidents.[10]

This court considered the statute's impact in a social host context in *Solberg v. Johnson*, 306 Or 484, 760 P2d (1988), and held that a statutory liability action existed under that scenario as well. In that case, the plaintiff, who had been injured in a car accident, brought suit against both the driver and the tavern that had allegedly served the driver when he was visibly intoxicated. After it settled with the plaintiff, the tavern then filed a third-party claim against the driver's drinking companion, who had provided alcohol to the driver when

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[9] Even as recently as 2000, this court has characterized *Chartrand* as "recognizing [a] third party's statutory liability claim under ORS 30.950 and common law negligence claim as separate and distinct theories of liability." *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 426, 9 P3d 710 (2000) (en banc) (holding that plaintiff could bring common law negligence claim, but not one under *former* ORS 30.950, against a tavern for injuries suffered as a result of his own intoxication), *superseded by statute as stated in Schutz v. La Costita III, Inc.*, 256 Or App 573, 302 P3d 460 (2013).

[10] Significantly, the court in *Gattman* declined to overrule or disavow *Chartrand*'s "*dictum*," even though it had not previously hesitated to do so in the alcohol liability context. *See Davis*, 284 Or at 356 n.4 ("To the extent that what we said in *Stachniewicz* [] may be construed as holding to the contrary, that portion of our decision in that case, which was not necessary to that decision, is overruled.").

he was visibly intoxicated by continuing to order and pay for his drinks. The tavern brought a statutory action under *former* ORS 30.955.[11]

After first stating that "ORS 30.950 was designed to hold liable for damages licensees who serve liquor to visibly intoxicated patrons,"[12] the court went on to consider whether the drinking companion could be considered a "social host" even though the social gathering had been at a tavern, not at a private home. The court held that "ORS 30.955 was *specifically adopted to provide a remedy* for persons such as the third-party plaintiff."[13] *Solberg*, 306 Or at 869 (emphasis added). Although King argues that the issue of statutory liability was undisputed in *Solberg* (White Br at 21 – 22), that does not change the fact that, once again, this court affirmed that the legislature had enacted *former* ORS 30.950 and 30.955 to provide a remedy for injured third parties against people who serve alcohol to visibly intoxicated patrons or guests who then cause a drunk-driving accident. Moreover, King is incorrect in

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[11] In 1987, ORS 30.955 was amended and its substance incorporated into ORS 30.950. Or Laws 1987, ch 774, §§ 13-14.

[12] *Solberg*, 306 Or at 869-70.

[13] In its current form, ORS 471.565 would likely bar the tavern in *Solberg* from maintaining a third-party claim against the driver's companion because the tavern substantially contributed to the patron or guest's intoxication. ORS 471.565(2)(b). However, this fact does not change the *Solberg* court's analysis that the statute was adopted to provide a remedy—*i.e.*, a statutory liability action—for injuries to third parties caused by drunk drivers who were served when visibly intoxicated. Nor does ORS 471.565(2)(b) have any effect on this case because Deckard—who knew neither King nor Bunch—did not contribute to Bunch's intoxication.

claiming that "in deciding the case, this court did not mention, let alone overrule, *Sager* and *Gattman*" (*Id.* at 22), at least with respect to *Gattman*:

> In *Gattman v. Favro* [], we stated that the proper "question in a statutory tort context is whether the plaintiff has pleaded an infringement by [the defendant] of a legal right arising independent of the ordinary tort elements of a negligence action." []
>
> An action which may violate a statute does not necessarily give rise to a statutory tort unless the tort is of the nature the statute was specifically designed to remedy. *Gattman,* 306 Or at 24[]. In *Gattman,* the question presented was whether ORS 30.950 provided a remedy to a victim of an attacker. The attacker was served alcohol at a public bar while visibly intoxicated, and then left the establishment and attacked the victim. In determining that ORS 30.950 did not apply in that case, this court examined the history and purpose of the statute. *We concluded that ORS 30.950 was not intended to apply to such a situation. In the present case, however, we conclude that ORS 30.955 was specifically adopted to provide a remedy for persons such as the third-party plaintiff.*

Solberg, 306 Or at 488 – 89 (emphasis added) (citation and quotations omitted). Far from neglecting to "overrule" *Gattman*, the court instead took great pains to explain why—in contrast to the plaintiff in *Gattman*—the *Solberg* third-party plaintiff *did* have a statutory claim, because the injuries there arose from a drunk-driving accident that occurred after a social host provided alcohol to a visibly-intoxicated guest. That is the situation the legislature sought to address, and the court's recognition of a statutory claim in that instance was consistent with both *Gattman* and the legislature's intent.

Just a few months after *Solberg*, the court decided *Hawkins v. Conklin*, *supra*. Hawkins—like the plaintiff in *Gattman*—was assaulted by a patron who

had been served alcohol while visibly intoxicated. He brought three claims, for common law negligence, for negligence *per se* based on ORS 471.410(1), and "for a theory of statutory liability based on ORS 30.950." *Hawkins*, 307 Or at 264. Relying on *Gattman*'s conclusion that "ORS 30.950 does not provide a statutory remedy in favor of plaintiffs who were injured in an assault," this court quickly disposed of the statutory liability claim. *Id.* at 265. Similarly, the court relied on principles of *stare decisis* in holding that *Stachniewicz* had determined "that ORS 471.410(1) is not an appropriate standard for establishing negligence *per se.*"[14] *Id.*

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[14] King notes an apparent tension between the court's refusal to endorse a "visibly-intoxicated" standard as a means to establish negligence *per se* and its acceptance of it in a common law negligence action or, arguably, a statutory action: "Whatever the grounds for liability, it is still all but impossible to determine whether someone who is so drunk as to be visibly intoxicated would not have got into an accident without one more drink." (White Br at 12 n.5.)

That argument is a straw man when examined in the context of ORS 471.565's legislative history. What is clear is that, in enacting the statute, the legislature wanted to hold accountable those who serve alcohol to visibly intoxicated persons who then drive drunk and injure innocent third parties. That the accident might have happened regardless of whether the already-visibly intoxicated driver had one more drink is not really the point. Someone who pours gasoline on a fire that is already burning did not cause the conflagration, but might nevertheless deserve sanction for socially irresponsible conduct. This court's reluctance to hold that ORS 471.410(1) is an appropriate standard to establish negligence *per se* in *Stachniewicz* (bar brawl) and *Hawkins* (assault after leaving tavern) is consistent with both: (1) its conclusions in *Sager* (intoxicated plaintiff) and *Gattman* (plaintiff stabbed by drunk bar patron) that *former* ORS 30.950 did not extend statutory liability in those circumstances; and (2) the legislature's 2001 amendments to *renumbered* ORS 471.565 that eliminated statutory and common law actions from intoxicated plaintiffs and also prohibited plaintiffs who contribute to the guest's intoxication from bringing an action. ORS 471.565.

The rest of the court's decision focused on the defendant's argument that "ORS 30.950 bars the plaintiff's claims of *common law negligence*." *Id.* at 266 (emphasis added). Previous decisions had considered whether *former* ORS 30.950 had created a statutory claim; this was the first time the court was asked to interpret how the statute affects a common law negligence claim. The plaintiff's only allegations of negligence were that the defendant had failed to call the police to eject the intoxicated patron when he became unruly, and that it had failed to protect the plaintiff as he left the bar. *Id.* at 268. This court held those "allegations do not state claims of common law negligence because the defendant can be liable only for serving alcohol to Shively and his companions when they were visibly intoxicated." *Id.* In his brief, King observes that the plaintiff was still required to allege foreseeable harm and unreasonable conduct, and concludes that "the court held that serving alcohol to a visibly intoxicated customer did not alone create liability." *Hawkins*, 307 at 268 – 69 (White Br at 23.) Of course, this is an obvious conclusion given that the court's discussion related to negligence, and not to whether *former* ORS 30.950 creates statutory liability. *Hawkins*, 307 Or at 268 – 69. The Court of Appeals recognized that distinction. *Deckard*, 267 Or App at 44 n.2 ("*Hawkins*, however, did not indicate that a claim in statutory liability cannot be brought. It did not address or resolve the issue presented in this case.").

What King completely overlooks is that the *Hawkins* court expressly acknowledged that statutory liability actions under *former* ORS 30.950 *do* exist to redress injuries incurred in drunk-driving accidents:

> The terms of ORS 30.950 do not support the defendant's argument that ORS 30.950 bars *all* actions, including common law actions, except those in which the plaintiff was injured by an intoxicated driver. *Gattman v. Favro* states *only* that *statutory liability under ORS 30.950 is so limited*. [] Nothing in the provisions of the statute limits the *common law liability* of licensees and permittees based on the manner in which the intoxicated patron injured the plaintiff. * * *

Hawkins, 307 Or at 268 n.6 (emphases added, citations omitted.) In other words, a plaintiff injured in a bar fight can bring a common law negligence action against the tavern that served alcohol to the visibly-intoxicated aggressor, but he cannot bring a statutory action based on *former* ORS 30.950 because those claims are limited only to drunk-driving accidents. *A statutory action exists only for a "plaintiff [who] was injured by an intoxicated driver.*" *Id.* Because Deckard was injured by a drunk driver who was served while visibly intoxicated, he is entitled to bring a statutory liability claim.

King prefers to focus on the second half of that *Hawkins* footnote, where the court indicated that the purpose of *former* ORS 30.950 was to "protect commercial alcohol servers," *id.* (White Br at 23.) There are two problems with that idea, however. First is that the court was explaining—after it had just stated that statutory liability exists for drunk-driving accidents—that the statute

did not limit the *common law* liability of a server based on the manner in which the intoxicated patron harms the plaintiff. *Id.* Second, this court's statement that the "legislative history does not indicate an intent to distinguish between the types of risks associated with intoxication" (*Hawkins*, 307 Or at 69 n.6) contradicts its earlier statement in *Gattman*: "Throughout the [1979] committee hearings, members assumed that the issue was the extent of licensee and permittee liability for injuries caused by intoxicated motorists under then existing case law and how such case law should be modified; at no time did anyone cite a fact pattern or example involving liability outside the context of automobile or traffic related injuries." *Gattman*, 306 Or at 22 (citing Minutes, House Comm. on Jud. (June 28, 1979, June 26, 1979, June 27, 1979); Minutes, Senate Comm. on State and Fed. Affairs and Rules (June 30, 1979)). During the legislative hearings on the 1979 bill that eventually became *former* ORS 30.950, the focus of the testimony—even that of the lobbyists—concerned the effects of drunk driving. Here are a few examples:

> Dave Dietz [Restaurants of Oregon lobbyist]: The first question we asked was, recently the Supreme Court ruled that taverns and bars may be legally responsible for the acts of their customers. If someone *becomes intoxicated, drives a car, and injures or kills someone,* the tavern or bar who served the person may be liable for the customers' actions. Who do you think should be legally responsible in such a situation? * * *
>
> We asked a very similar question regarding social hosts. Who should be liable for the acts of an intoxicated person when that person became intoxicated at a private party? * * * The *intoxicated driver*, the people of Oregon believed ought to be

> responsible for his own actions to the tune of 92% of the responses. * * *
> Chairman Frohnmayer: * * * There's nothing in the [Supreme Court's] decision, as I understand that would limit the liability of an *intoxicated driver*, in terms that the person had access.

HB 3152, House Jud. Comm., June 11, 1979 – 1:30 p.m., Tape 85 (App-7) (emphases added).

> Representative Lombard: * * * in the case of *Wiener*, we had a situation in which the suit was simply based on common law negligence against the individual who had sold liquor to, not an intoxicated minor, but an un-intoxicated minor, and the liquor was thereafter conveyed to a party. It was consumed by other minors, and *an accident resulted*, and so forth. * * *

Id. (App-21 – 22) (emphasis added).

> Representative Smith: I'm struggling with the *Con-Teena* case in the sense that if a minor who is clearly a minor buys alcohol, takes it out, gives it to a friend at college, friend at college takes it home and what it is it's bootleg old Grandad that he wants to give his father for Christmas, and he couldn't get it any other way, so he basically buys it illegally, gives it to his dad for Christmas, his dad *drives off the road and kills himself*, is the right of action against the seller of the alcoholic beverage? * * *

Id. (App-28) (emphasis added).

> Senator (unidentified): I know that if somebody had a drink at my establishment, one drink, and later visited five more places, and then were *involved in an accident driving while intoxicated*, then did they, would they, what does this do, allow them to sue everybody along the line? Or does it protect somebody along the lines?

HB 3152, Senate Comm. on State and Fed. Affairs and Rules, June 30, 1979,

Tape 9 (App-33) (emphasis added).

> In short, to say—in light of that discussion—that the only purpose of

former ORS 30.950 was to "protect commercial alcohol servers," *Hawkins*, 307 Or at 69 n.6, flies in the face of logic, and contradicts this court's legislative reviews in *Sager*, *Chartrand*, and *Gattman*. Had the legislature truly intended only to protect alcohol servers, then why would it delete the "gross negligence" standard that HB 3152's proponents wanted to include? Why leave plaintiffs with any liability claims at all? The logical answer is that the statute is the result—as statutes often are—of the "legislature's balancing of … competing interests." *Knapp v. City of N. Bend*, 304 Or 34, 39, 741 P2d 505 (1987) (en banc). When it enacted *former* ORS 30.950, the legislature tried to respond to the restaurant industry's concerns about insurance availability;[15] at the same time, however, it clearly was aware that drunk driving was an adverse consequence of serving visibly intoxicated persons. The Court of Appeals correctly concluded that "[t]he legislative history demonstrates a continued concern to preserve liability as to hosts for harm caused to innocent third parties in drunk-driving accidents." *Deckard*, 267 Or App at 50.

Finally, in *Grady v. Cedar Side Inn*, 330 Or 42, 997 P2d 197 (2000), the court allowed a third party injured by a drunk driver to pursue both statutory

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[15] The insurance issue is apparently no longer as serious a problem as it was in 1979; in the late 1990's, the legislature passed a statute requiring most liquor licensees to carry minimum levels of liability insurance or a bond. *Former* ORS 471.218, Or Laws 1997, ch 841, § 4; *renumbered to* ORS 471.168, Or Laws 1999, ch 351, § 22.

and common law claims against the restaurant that had served the driver when visibly intoxicated, even though the plaintiff had also been drinking with the driver and purchased much of their beer. *Grady*, 330 Or at 48. In so doing, the court categorically stated that "ORS 30.950 *subjects licensees, permittees, and social hosts to liability* to third parties for injuries caused by the intoxicated patron or guest whom they served." *Id.* at 49 (emphasis added).

D. Later Amendments to ORS 471.565 Confirm That the Statute's Original Intent Was to Create Statutory Liability for Third Parties Injured In Drunk-Driving Accidents

In 2001, the restaurant industry returned to the legislature, eager to overturn the court's decisions in *Fulmer* and *Grady*. *See, e.g.*, SB 925, Senate Jud. Comm., March 13, 2001 – 1:00 p.m., Tape 57, Side A (App-136 – 38) (discussing *Fulmer*); SB 925, House Jud. Civ. Subcomm., May 14, 2001, Tape 94, Side A (App-139) (discussing *Fulmer* and *Grady*). As King notes, the effect of the eventual amendments was to renumber the statute to ORS 471.565, and to change its language to its current configuration. (White Br at 24.) Those amendments codified *Fulmer*'s holding that an intoxicated plaintiff did not have a statutory cause of action against a server for his own injuries (and extended this court's holding by also prohibiting a common law claim),[16] and overruled *Grady*'s holding that a plaintiff could bring a statutory claim against a server or

[16] This section is now ORS 471.565(1).

host even if he had contributed to the intoxication of the person causing the injury.[17] Neither of those amendments, however, changes the fact that ORS 471.565 still "subjects licensees, permittees, and social hosts to liability to third parties for injuries caused by the intoxicated patron or guest whom they served." *Grady*, 330 Or at 49. Those amendments also do not affect Deckard's claim in any way; Deckard did not injure himself, nor did he contribute to Bunch's intoxication.

However, the 2001 changes to ORS 471.565 continued the legislature's commitment to providing a statutory liability claim to third parties injured by drunk drivers.[18] As originally proposed by the restaurant and beverage industry in 2001, SB 925 provided only that a person who was injured as a result of his own voluntarily intoxication would not have a common law negligence claim against the server.[19] At the suggestion of legislative counsel, however, the bill's language was amended to also prohibit statutory claims:

> Dave Heynderickx: * * * "[I]t occurred to me that perhaps it would be better to make it clear that this law that—*this change to the law*—would in fact not allow suits under theories, *not only for common law negligence, which is what is specified in the bill, but*

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[17] This section is now ORS 471.565(2)(b).

[18] This court "not infrequently refers to later-enacted statutes for the purpose of demonstrating consistency (or inconsistency) in word usage over time as indirect evidence of what the enacting legislature most likely intended." *Halperin*, 352 Or at 490-91 (citing cases).

[19] That makes sense, given that *Fulmer* had already held that a statutory claim was not available to the plaintiff in that situation. *Fulmer*, 330 Or at 426.

> *also under any theory*. And that was the intent of the changes that the counsel had given you.
>
> * * *
>
> If you look at the bill on line seven, starting in the middle, it says: that the person does not have a cause of action, it would insert, comma, based on statute or common law, comma, against the person serving the alcoholic beverages. Then it would delete the: based on common law negligence, on line eight.

SB 925, Sen. Jud. Comm., March 13, 2001 – 1:00 p.m., Tape 57, Side A (App-137) (emphases added). The senators on the committee agreed and amended the language accordingly. *Id.* at App-139. If the legislature had never intended for ORS 471.565 (or its predecessors) to permit statutory liability actions, then it would be unnecessary—when implementing "this change to the law"—to expressly remove that right from future plaintiffs. *Id.* at App-137.

And both legislators and lobbyists during the 2001 session "demonstrate[d] a continued concern to preserve liability as to hosts for harm caused to innocent third parties in drunk driving accidents:"[20]

> [The bill] doesn't apply to injuries that are caused to third parties. So if [an intoxicated patron] goes out and is in an automobile accident and kills or injures somebody else, that business owner or host is still going to be liable to the third party.

Tape Recording, House Comm. on Jud., SB 925, May 23, 2001, Tape 69, Side

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[20] *Deckard*, 267 Or App at 50.

A (statement of Bill Perry, lobbyist for the Oregon Restaurant Association.)[21]

> [T]his [bill] is not going to create an incentive for bar owners to serve people in an intoxicated state. Clearly, it's not because the greater risk is that they're going to go out and hurt somebody else, in which case then the bar owner is still going to be liable.

SB 925, House Comm. on Jud., May 23, 2001, Tape 69, Side A (App-141) (statement of Representative Shetterly).

Finally, and as evinced by the comments of restaurant lobbyist Bill Perry, the restaurant and beverage industry appears to have always understood—and accepted—the fact that ORS 471.565(2) (and its predecessors) impose statutory liability, at least with respect to drunk-driving accidents that result from serving a visibly-intoxicated person. Consider that the industry is by no means unfamiliar with this court's liquor liability jurisprudence. The original 1979 legislation was spurred by the industry's efforts to overturn the holdings in *Campbell* and *Davis*, and the industry lost no time in rushing to the legislature as soon as it could after the court's *Fulmer* and *Grady* decisions. But in the thirty years since *Chartrand* first announced that a plaintiff injured in a drunk-driving accident could bring a statutory liability claim against the person who served the visibly-intoxicated driver, the restaurant and beverage industry has

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[21] Curiously, this statement does not appear in the legislative history collection provided by Smith Freed & Eberhard, although there is a transcript of hearings conducted on that day by that committee. The Court of Appeals, however, mentioned it in its opinion. *Deckard*, 267 Or App at 50.

never asked the legislature to alter the statute to remove that right.

E. Summary

In summary, the text and context of ORS 471.565 indicate that the legislature intended to create statutory liability. This court has extensively reviewed the statute's legislative history—in *Sager*, *Chartrand*, and *Gattman*—and each time concluded that the legislature was focused on licensee and host liability for injuries caused by third parties in drunk-driving accidents. The court has stated and restated—in *Solberg*, *Hawkins* and *Grady*—that the statute imposes statutory liability when the plaintiff is injured by a drunk driver.

That interpretation is consistent with the fact that the same statute also imposes additional pleading and proof requirements for common law claims. The court has made perfectly clear—in *Gattman* and *Hawkins*—that the legislature did not intend statutory liability to exist for injuries suffered other than in a drunk-driving accident. Plaintiffs injured in a bar brawl are therefore limited to a common law negligence claim, for which they must plead and prove the additional requirement that the aggressor was served while visibly intoxicated, as well as the usual negligence elements of foreseeability and unreasonable conduct. The legislature has gone even further to remove *all* claims, both common law and statutory, from plaintiffs who are injured by their own intoxication. ORS 471.565(1). But it is clear that the legislature, concerned about the effects of drunk driving, has left intact what has always

been part of the statute: a social host may be held statutorily liable for injuries caused by a drunk driver whom he served while the driver was visibly intoxicated.

Although the court has long recognized that statutory right, the circumstances of its decisions have left room for defendants to argue otherwise. The plaintiff has either injured himself (*Sager*) or been hurt in a bar fight (*Gattman*, *Hawkins*), so that the court's analysis was focused on what the statute does *not* provide. Or the court has clearly announced that the statute establishes liability, but in instances where that question was not directly at issue (*Chartrand*, *Solberg*, *Grady*). The stars have now aligned. Before the court is a plaintiff who is squarely in the class that the legislature intended to protect alleging a statutory claim that the legislature intended to provide. The court can now lay to rest any doubt regarding the legislature's intent. It should affirm the Court of Appeals' decision reversing the trial court's dismissal of Deckard's statutory liability claim.

F. The Trial Court's Dismissal of Deckard's Statutory Claim Was Not Harmless Error Because It Substantially Affected His Rights

King argues that Deckard is not entitled to reversal of the trial court's Rule 21 dismissal because he did not meet his burden to prove how that decision harmed him. Deckard, however, has already met his burden to demonstrate that the trial court's error was not harmless. Because the nature of the error was the pre-trial dismissal of an entire claim, it is an "error[] of law

apparent on the record." ORAP 5.45(1); *see also State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990) (en banc) (error of law is apparent when "the legal point is obvious, not reasonably in dispute," and on the record when the appellate court "need not go outside the record or choose between competing inferences to find it, and the facts that comprise the error are irrefutable"). Even if Deckard had not raised the trial court's dismissal of his statutory liability claim as error—which he most certainly did—this court may nevertheless exercise its discretion to consider such an apparent error if it expressly chooses to do so. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 384, 823 P2d 956 (1991) (en banc).

King claims that Deckard was not harmed by the trial court's dismissal of the statutory liability claim under ORS 471.565 because the jury was instructed exactly as it would have been if the statutory claim had been part of the case. (White Br 32 – 34.) Because a statutory tort does not require proof of foreseeability, King argues, then "the plaintiff in a case based on [ORS 471.565(2)] could recover merely by proving that the defendant served alcohol to a guest who was visibly intoxicated and that the plaintiff was injured as a result." (White Br at 32.) King then suggests that the jury was instructed to consider foreseeability only as to the negligence claim against Bunch because the trial court gave different instructions to the jury regarding proof of Bunch's versus King's negligence—one that required the jury to consider whether

Bunch was negligent and the other that required the jury to consider whether King had served or provided alcohol to Bunch while she was visibly intoxicated. King argues that, because the jury was not instructed to consider whether King was negligent, the lack of a statutory claim (which would also have been devoid of any negligence consideration) did not affect the trial's outcome and was harmless error. (White Br at 33 – 34.)

King's argument is utterly mistaken. The trial court *did* instruct the jury to consider foreseeability, as well as the other usual negligence elements, in considering the entire negligence claim against King and the damages portion of the negligence claim against Bunch. The reason why Bunch and King were given separate negligence instructions is because arguably ORS 471.565(2) elevates the burden of proof for liability for a common law negligence claim against a social host from the usual preponderance-of-the-evidence standard to a clear-and-convincing standard, notwithstanding the fact that the claim involved a drunk-driving accident and not a bar fight.[22] ORS 471.565(2). But all of the other elements of negligence remain: duty to use reasonable care, foreseeability, causation and damages. The jury was, in fact, instructed on all

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[22] In an abundance of caution, Deckard did not dispute that the elevated standard of proof applied. The Court of Appeals, however, "express[ed] no opinion whether the standard of clear and convincing evidence properly applied to plaintiff's common-law negligence claim against King." *Deckard*, 267 Or App at 53 n.8.

of those elements for both Bunch and King. Lest there be any question that the jury considered foreseeability as applied to Deckard's negligence claim against King, Deckard reproduces the entirety of the negligence instructions:

> In this case, there are two different kinds of proof -- there's two different standards of proof. These standards are proof by a preponderance to the evidence and proof by clear and convincing evidence on which the Court will instruct you now.
>
> Preponderance of the Evidence. The term 'preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has more convincing force, is more probably true and accurate.
>
> If the evidence appears to be equally balanced and you cannot say on which side it weighs heavier, you must resolve that question against the party on whom the burden of proof rests.
>
> In this case, proof by a preponderance of the evidence, uh, standard applies to all claims made by the Plaintiff except Plaintiff's claim of liability against Defendant King.
>
> ****
>
> Clear and Convincing Evidence. When a party must prove an element of a claim by clear and convincing evidence, that party must persuade you by evidence that makes you believe the truth of the element is highly probable. You should consider all of the evidence, no matter who presented it. This is, this is a higher standard of proof than preponderance of the evidence, but lower than the criminal standard beyond a reasonable doubt.
>
> In this case, **proof by a clear and convincing evidence standard applies only to the elements of the Plaintiff's claim of liability against Defendant King**. All remaining claims made by Plaintiff in this case are subject to proof by a preponderance of the evidence standard.
>
> Negligence and Causation. The law assumes that all persons have obeyed the law and been free from negligence. The mere fact alone that an accident happened or that a person

was injured is not sufficient proof of itself to prove negligence. It is, however, a circumstance that may be considered along with other evidence.

To recover against Defendant Bunch, the Plaintiff must prove two things by a preponderance of the evidence. One, that the Defendant Bunch was negligent in at least one o[f], uh, the ways claimed in the Plaintiff's Complaint and, two, that Defendant Bunch's negligence was a cause of damage to the Plaintiff.

In this case, Defendant Bunch has admitted that she was negligent and caused the accident.

To recover against Defendant King, the Plaintiff must prove two things. One, that by clear and convincing evidence, Roland King served or provided Defendant Bunch alcohol when she was visibly toc -- intoxicated and, two, that Roland King's serving or presiding -- providing alcohol to Diana Bunch while visibly intoxicated was a cause of damage to the Plaintiff.

Common Law Negligence. The law requires every person to use reasonable care to avoid harming others. Reasonable care is the degree of care and judgment used by reasonably careful people in the management of their own affairs to avoid harming themselves or others.

In deciding whether a party used reasonable care, consider the dangers apparent or reasonably foreseeable when the events occurred. Do not judge the party's conduct in light of subsequent events. Instead, consider the party -- what the party knew or should have known at the time.

A person is negligent, therefore, when the person does some act that a reasonably careful person would not do or fails to do something that a reasonably careful person would do under the similar circumstances.

A person is liable only for reasonably foreseeable consequences of their actions. There are two things that must be foreseeable. One, the Plaintiff must, um, be within the general class of persons that one would reasonably, uh -- that one reasonably would anticipate might be threatened by the Defendant's conduct. Two, the harm suffered must be within the general class of harms that one reasonably would anticipate might result from the Defendant's conduct.

(Tr 1647 – 1650 (emphases added).)

The final instruction in bold illustrates how the dismissal of Deckard's statutory claim was not harmless error. Foreseeability is not part of a statutory liability claim; it is "irrelevant." *Chartrand*, 298 Or at 696. If the statutory claim had remained in the case, then the trial court would have separately instructed the jury—only as to King—regarding that theory of liability, which would have been addressed by a separate question on the verdict form.[23] Those instructions would *not* have included foreseeability, reasonable care, or anything else to do with negligence. Instead, the jury would have been instructed that, to find King liable, plaintiff must have proved by clear and convincing evidence that King served or provided alcohol to Bunch while she was visibly intoxicated and that such conduct caused Deckard's damages. Because the jury necessarily considered issues in Deckard's negligence claim against King that Deckard would not have had to prove in a statutory tort claim, the trial court's error "substantially affected" Deckard's rights in such a way that requires reversal. ORS 19.415(2); *see also Wallach v. Allstate Ins. Co.*, 344 Or 314, 329, 180 P3d 19 (2008) (en banc) (incorrect instruction on a claim

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[23] During the hearing on King's motion to dismiss Deckard's statutory claim, the parties specifically discussed how the motion would impact the verdict form – and the implications that might have on appeal. Counsel for Deckard observed that striking the statutory claim could require a retrial, but counsel for King argued that the trial court should strike the statutory claim anyway. (Tr 13).

that permits the jury to reach a legally erroneous result substantially affects the rights of a party and justifies reversal).

King brushes off the trial court's long negligence instruction that included the foreseeability requirements, arguing that "jurors would not have related that instruction to the claim against King, rather than the claim against Bunch, because, again, they were not instructed that plaintiff had to prove King was negligent in order for plaintiff to recover against him …." (White Br at 34 – 35.) But that completely ignores the fact that Bunch had *admitted liability* for the negligence claim against her (Tr 1667.) In other words, there was no reason for the jury to even consider the elements of negligence as they related to Bunch's liability for causing the accident; to the jury, the only reason why the negligence instructions were there was because they somehow affected how it was to decide King's liability. *See Deckard*, 267 Or App at 54 ("Insofar as Bunch had admitted liability, the negligence instructions pertained only to King."). The error was not harmless.

IV. CONCLUSION

The trial court erred in dismissing Deckard's statutory claim pursuant to ORS 471.565. This court should affirm the Court of Appeals' decision reversing the trial court, and remand this case for trial on the statutory liability claim.

DATED: June 30, 2015

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 11,523 words.

Type size

I certify that the size of type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.50(4)(f).

DATED: June 30, 2015

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the attached brief by electronic filing on June 30, 2015. I further certify that on the same date, I served a copy of this brief on the following lawyers by using the electronic service function of the eFiling system (for registered eFilers) or by first-class mail (for those who are not registered eFilers):

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