IN THE SUPREME COURT OF 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 No. 102298
Court of Appeals No. A151792
Supreme Court No. S062948

Appeal from the General Judgment of the Lincoln County Circuit Court, by the Honorable Charles P. Littlehales, Judge

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Defendant King's Reply Brief

Date of Decision:	November 19, 2014
Author:	DeVore, J.
Concurring:	Hadlock, P.J., and Schuman, S.J.

July 2015

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Most points raised in plaintiff's brief on the merits are addressed in defendant King's brief on the merits. But a few points warrant a reply.

1. Plaintiff Relies on the Wrong Statute

Plaintiff cites *Doyle v. City of Medford*, 356 Or 336, 344, 337 P3d 797 (2014), for the proposition that "[s]tatutory liability arises when a statute either expressly or impliedly creates a private right of action for violation of a statutory duty." Pltf's Merits Br 5. He then argues that ORS 471.565(2) imposes a duty on commercial and social hosts not to serve alcohol to a guest who is visibly intoxicated and, in addition, creates liability – impliedly, if not expressly – when an overserved guest injures a third person. *Id.* at 6-9. In fact, ORS 471.565(2) does *not* impose a duty on hosts not to overserve guests. That duty is imposed, instead, by another statute, ORS 471.410(1), which reads: "A person may not sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated."[1]

Plaintiff does not contend that ORS 471.410(1) creates a right of action for breach of the duty imposed there, no doubt because this court has said that visible intoxication is not an appropriate standard for creating liability *per se*. *See*

[1] The statute contained substantially the same proscription in 1979, when the legislature enacted *former* ORS 30.950 and *former* ORS 30.955, the predecessors to ORS 471.565. It said: "No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated."

Stachniewicz v. Mar–Cam Corporation, 259 Or 583, 586-87, 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); *see also Hawkins v. Conklin*, 307 Or 262, 265, 768 P2d 66 (1988) (adhering to *Stachniewicz*). It would be strange, indeed, if this court were to hold that a statute which *doesn't* impose a duty not to overserve guests (ORS 471.565(2)) *can* result in civil liability while a statute that *does* impose that duty (ORS 471.410(1)) *can't*. That holding would seem to be exactly backwards.

A more plausible interpretation of ORS 471.565(2) is that it wasn't intended to create statutory liability for overserving guests – for doing what ORS 471.410(1) already prohibited – but rather to preclude liability under any theory, statutory or common law, without proof that the guest was overserved. And, indeed, that is just what ORS 471.565(2) says: a host "is not liable for damages caused by intoxicated patrons or guests unless * * * [the] host served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated."

2. The "Best Evidence" Supports King, Not Plaintiff

Plaintiff agrees with defendant that the text of a statute is the "best evidence" of what the legislature intended. *See* Pltf's Merits Br 5. He then argues that ORS 471.565(2) is written in a way that demonstrates an intent to create liability. In

fact, the way it's written demonstrates the opposite intent: to limit whatever liability might otherwise exist under law. As this court observed in *Sager v. McClenden*, 296 Or 33, 39, 672 P2d 697 (1983), the statute's "language" – meaning its *not-liable-unless* construct – "logically limits relief rather than expands it." And, in *Gattman v. Favro*, 306 Or 11, 23 n 11, 757 P2d 402 (1988), the court made the same observation. "[I]t it is unusual," the court said, "to create a statutory tort with language that 'no person is liable unless.'"[2]

Plaintiff tries unsuccessfully to distinguish these cases. *Sager*, he says, involved a first-party claim, not a third-party claim – a claim by an inebriated guest for injury to himself, not a claim by someone who was injured by the guest. And *Gattman*, plaintiff explains, didn't involve the right *kind* of third-party claim – one brought by a person within the class that, according to plaintiff, ORS 471.565(2) was intended to protect, namely, drunk driving victims (more on that below). *See* Pltf's Merits Br 8 n 2. Those distinctions don't hold up. Whatever the type of claim, and whomever the claimant, *Sager* and *Gattman* were construing the same statutory language that is at issue here. And the meaning of that language doesn't change from one case to another. It stays the same. It might or might not *apply*, depending on the claim or claimant. But the language itself means the same today

[2] For examples of statutory language that *does* express an intent to create liability, see Def King's Merits Br 8.

as it did yesterday, and as it will tomorrow. And that language, as explained above, logically limits relief rather than expands it.

3. Plaintiff Mistakes the "Context" of the Statute

Plaintiff argues that the "context" of ORS 471.565(2) indicates an intent to create, not limit, liability. See Pltf's Merits Br 8. The context he is referring to is the first subsection of the statute, ORS 471.565(1), which provides that a person who injures himself while drunk on alcohol served by a commercial or social host "does not have a cause of action, based on statute or common law," against the host, "even though" he was served while visibly intoxicated. Plaintiff argues that the legislature would have used the same language in ORS 471.565(2) – *i.e.*, "does not have a cause of action" *etc.* – if it had intended by that subsection to limit a host's liability for injury to a third party from an inebriated guest. "The fact," he says, "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." Pltf's Merits Br 9.

Actually, the operative language in ORS 471.565(2) is no less broad than the operative language in ORS 471.565(1). If a host is "not liable for damages" to a person injured by a guest, then that person "does not have a cause of action, based

on statute or common law," against the host. But the bigger problem with plaintiff's "contextual" argument is that subsection (2) of ORS 471.565 was not, as plaintiff suggests, enacted "just after" subsection (1). In fact, it was enacted long before. As King explained in his prior brief, the not-liable-unless provision in ORS 471.565(2) comes from *former* ORS 30.950 and *former* ORS 30.955, which were enacted in 1979. *See* Def King's Merits Br 13, 23-24. The no-cause-of-action provision in ORS 471.565(1) was enacted in 2001. *Id.* at 24-27. The subsections appear together on the page, but they were enacted two decades apart and, therefore, ORS 471.565(1) is not "context" for ORS 471.565(2). The fact that, when it enacted ORS 471.565(1), the 2001 legislature didn't use the same language that already existed in ORS 471.565(2) might say something about the intent of *that* legislature or the meaning of *that* subsection. But it says nothing about the intent of the 1979 legislature or the meaning of subsection (2).

4. *Chartrand* Hasn't Held Up Over Time

The plaintiff in *Chartrand v. Coos Bay Tavern*, 298 Or 689, 696 P2d 513 (1985), was injured in an auto accident caused by a drunk driver leaving a tavern. The jury returned a verdict for the plaintiff on her negligence claims, but this court reversed and ordered a new trial because of error in the instructions. *Chartrand*, 298 Or at 692-95. The court went on to say that the plaintiff *could have* brought a

"statutory tort" claim "based on [*former*] ORS 30.950." *Id.* at 695. But, as explained in King's prior brief, that statement was *dictum*, because the plaintiff did not in fact bring such a claim. *See* Def King's Merits Br 18-19. Plaintiff seems to concede that point, but argues that the statement, even if *dictum*, has "withstood the test of time." Pltf's Merits Br 18.

Actually, it hasn't yet been tested. Until this case, no one has challenged *Chartrand*'s "holding" on whether *former* ORS 30.950 creates statutory liability. In the meantime, this court, on its own, called that holding "*dictum*" in a later case. *See Gattman*, 306 Or at 23. That is hardly standing up to time.

5. No Basis for Plaintiff's Auto/Non-Auto Distinction

Plaintiff concedes that ORS 471.565(2) does not create a statutory remedy for all injuries caused by overserved guests. But, relying on *Gattman*, he argues that it creates a remedy a least for "for injuries caused by a drunk driver." Pltf's Merits Br 19. It's difficult to see how plaintiff can derive that holding from that case. To start with, *Gattman* didn't involve drunk driving. The case was brought against a tavern that served alcohol to a visibly-intoxicated patron who then stabbed the plaintiff at another location. 306 Or at 13-14. Moreover, the court held that the plaintiff *didn't* have a remedy under *former* ORS 30.950, the predecessor to ORS 471.565(2); he only had a remedy in negligence. 306 Or at 24.

The fact that ORS 471.565(2) *doesn't* create liability in *non*-auto cases, as *Gattman* says, doesn't mean that it *does* create liability *in* auto cases. Plaintiff's argument to the contrary is fallacy of the "denying the antecedent" variety.[3]

More importantly, plaintiff's argument doesn't connect with the language of the statute. ORS 471.565(2) does not distinguish between auto and non-auto injuries. It doesn't mention automobiles or drunk drivers or any particular type of injury. It says only that a commercial or social host is not liable "for damages" caused by intoxicated guest without proof that the host served the guest while the guest was visibly intoxicated. The guest could have been behind the wheel when he caused the damages – or holding a knife or gun. It doesn't matter which, based on the statutory language. There is nothing in that language to support plaintiff's auto/non-auto distinction.

In addition to *Gattman*, plaintiff cites *Hawkins* as support for his argument that ORS 471.565(2) creates a statutory remedy for drunk-driving injuries, if not

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[3] *See https://en.wikipedia.org/wiki/Denying_the_antecedent*:

> "Denying the antecedent, sometimes also called inverse error or fallacy of the inverse, is a formal fallacy of inferring the inverse from the original statement. It is committed by reasoning in the form:
>
> "If P, then Q.
>
> "Not P.
>
> "Therefore, not Q."

for other types of injuries. *See* Pltf's Merits Br 24-26. But *Hawkins*, like *Gattman*, wasn't a drunk-driving case – it, too, was an off-premises assault case. 307 Or at 264. And *Hawkins*, like *Gattman*, upheld the dismissal of the plaintiff's statutory claim. *Id.* at 365. So, once again, plaintiff is trying to find authority for statutory liability in auto cases from the denial of such liability in a non-auto case. Aside from the illogic of that endeavor, there is, again, nothing in the language of the statute to support that distinction, nor in the statute's legislative history, as *Hawkins* itself remarked:

> "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. Furthermore, the legislative history does not indicate an intent to distinguish between the types of risks associated with intoxication. * * *"

Id. at 268 n 6.[4]

6. The Legislature Hasn't Reverse-Codified *Chartrand*

Plaintiff suggests that the legislature's failure to respond to *Chartrand*'s "statutory tort" comment means that the legislature agrees with it and, therefore,

[4] Some of the legislators and witnesses that participated in the 1979 hearings on the bill that became *former* ORS 30.950 and *former* ORS 30.955 referred in their hypotheticals to the anticipated effects of the proposed legislation on claims involving drunk driving, no doubt because that is the most familiar risk of overserving a guest. *See* Pltf's Merits Br 27-28 (quoting some of the speakers). But that doesn't mean that it is the only risk of overserving guests or the only risk the legislators and witnesses were concerned about. None of the speakers – certainly none that plaintiff quotes – said the new law would address that risk only.

that this court is unable now to disavow it – to conclude that it was not just *dictum*, but erroneous *dictum*. *See* Pltf's Merits Br 33-34. Plaintiff's "*amicus*," the Oregon Trial Lawyers Association, makes the same point, noting that the legislature "could have 'corrected' *Chartrand*" when, two years later, it combined *former* ORS 30.950 and *former* ORS 30.955. *See* OTLA Br 4-8 (discussing Or Laws 1987, ch 774, § 13). According to OTLA, the legislature, by doing nothing, has, in effect, codified *Chartrand* in reverse.

These arguments invoke the version of *stare decisis* that is often referred to as the "rule of prior interpretation." Under that rule, "[w]hen this court interprets a statute, the interpretation becomes a part of the statute, subject only to a revision by the legislature." *State v. King*, 316 Or 437, 445-46, 852 P2d 190 (1993). In *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 695, 261 P3d 1 (2011), this court noted that the prior-interpretation rule "has long been criticized as wrong in principle and unduly restrictive in practice," in large part because it is based on an untenable theory of legislative acquiescence:

> "That theory posits that a judicial decision interpreting a statute becomes ratified by legislative silence and thus can only be changed by the legislature. * * * Legislative acquiescence, however, is a legal fiction that assumes, usually without foundation in any particular case, that legislative silence is meant to carry a particular meaning – as relevant here, affirmation of the judicial decision at issue. * * * In reality, the legislature may decline to address a judicial decision for any number of reasons, none of which necessarily constitutes an endorsement of the decision's reasoning or result; this court does not

> surrender its authority to reexamine a prior interpretation of a statute merely because the legislature has been silent on the issue."

350 Or at 696 (citations omitted).

The court in *Mowry* disavowed the rule of prior interpretation. *Id.* at 697. Accordingly, plaintiff and OTLA should not be heard to argue that the legislature's failure to amend *former* ORS 30.950 in a way that signals disapproval of *Chartrand* means that the legislature actually approves of that decision and that this court can't reconsider the opinion. *Chartrand's dictum* is not an unfixable mistake.

7. The 2001 Legislation Didn't Create Statutory Liability

Plaintiff's fallback argument is that, if the legislature didn't create statutory liability when it enacted the predecessor to ORS 471.565(2) in 1979, then it surely did so when it amended the statute in 2001. In fact, the 2001 legislation made it harder, not easier, for third parties to sue hosts for injuries caused by guests who were served while visibly intoxicated.

The 2001 legislation made two major changes to *former* ORS 30.950, in addition to renumbering it as ORS 471.565. First, it added a subsection, now ORS 471.565(1), that limits first-part claims, meaning claims by drunk guests for injuries they inflict on themselves. Second, it added a paragraph to what is now ORS 471.565(2), barring third-party claims by plaintiffs who contributed to the

intoxication of the guest. These changes were contained in Oregon Laws 2001, chapter 534, section 1, which reads in relevant part as follows (new language in bold; omitted language in brackets and italics):

"**SECTION 1.** ORES 30.950 is amended to read:

"**(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.**

"[*(1)*] **(2)** *[No]* **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 *[incurred or]* caused by intoxicated patrons or guests *[off the premises of the licensee, permittee or social host]* 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 proves by clear and convincing evidence that the patron or guest was served alcoholic beverages while visibly intoxicated]*

"**(b) The plaintiff did not substantially contribute to the intoxication of the patron or guest by:**

> "**(A) Providing or furnishing alcoholic beverages to the patron or guest;**
>
> "**(B) Encouraging the patron or guest to consume or purchase alcoholic beverages or in any other manner; or**
>
> "**(C) Facilitating the consumption of alcoholic beverages by the patron or guest in any manner."**

Neither of these changes altered the original statute's limitation on liability for third-party claims against hosts who serve alcohol to visibly intoxicated guests. In fact, the first change – new subsection (1) – doesn't even address third-party claims. The second change – new paragraph (b) in what is now ORS 471.565(2) – addresses such claims, but only to make them harder to bring, by codifying the "complicity defense" that this court rejected a year earlier in *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000). Neither of these changes altered the original statute's not-liable-unless language, which, as discussed above, logically limits, not expands, liability. There is no merit, then, to plaintiff's argument that the 2001 changes to what is now ORS 471.565(2) evince an intent to create statutory liability in third-party cases.

There is even less merit, if that is possible, to OTLA's argument that such intent can be found in the part of the 2001 law that created what is now ORS 471.565(1). *See* OTLA Br 9-10. To start with, ORS 471.565(1) doesn't concern third-party liability. As noted above, it addresses first-party liability – that is, a claim by a drunk guest for injuries he inflicted on himself. Second, the new law

does not say that a drunk guest has a right of action for self-inflicted injuries *if* he was served while visibly intoxicated. It says just the opposite: the guest "does *not* have a cause of action, based on statute or common law," against the host "*even though*" he was served while visibly intoxicated. The import of that language is clear: no matter whether the guest was served by the host while already drunk, he can't sue the host for injuring himself. The new section was intended, everyone agrees, to overturn *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 9 P3d 710 (2000), which was decided a year earlier and which held that a commercial host could be found liable in negligence for serving alcohol to a guest who is visibly intoxicated and who then injures himself. *See* Def King's Merits Br 24-27; Pltf's Merits Br 30. It makes no sense, then, to construe the new subsection to create a statutory right of action *in addition to* the common-law right that *Fulmer* recognized and thus make it easier for inebriated guests to recover from hosts for injuries to themselves. The legislature was trying to rein in this type of liability, not expand it.

Plaintiff notes that, as originally drafted, the part of the 2001 law that became ORS 471.565(1) provided that a person who injures himself while inebriated does not have a cause of action against his host "based on common law negligence," but that, at the suggestion of legislative counsel, the bill was amended to provide that the person does not have a cause of action "based *on statute or*

common law." Pltf's Br 31-32 (emphasis added). That amendment, plaintiff suggests, means the 2001 legislature "thought" that ORS 471.565(2) – the part of the prior statute that was not affected by the original bill or the amendment – was created statutory liability in third-party cases such as this one.

That suggestion is untenable for several reasons. First, subsection (1) concerns first-party claims, not third-party claims, so there was no reason to reference subsection (2) in subsection (1). Second, legislative counsel undoubtedly knew that this court had previously held, in *Sager*, 296 Or at 40, that subsection (2) does *not* create liability in first-party cases. Third, the counsel, in explaining the amendment, didn't refer to subsection (2), and surely he would have if that was the particular "statute" he was thinking about. It seems clear, then, that the purpose of the amendment was to make clear *going forward* that *first*-party claims could not be brought under *any* theory, including liability under statutes not yet considered by the courts, which was just what the legislative counsel said in explaining the amendment. *See* Pltf's Br 31-32. All that aside, whatever the 2001 legislature might have thought about the 1979 law could not have altered that law's actual effect. If ORS 471.565(2) didn't create a statutory tort when enacted, it would not matter that the 2001 legislature thought that it did.

8. The Error, If Any, Was Harmless

Plaintiff all but concedes that he suffered no harm from the dismissal of his claim based on ORS 471.565(2). He makes no effort to demonstrate how the trial would have been different but for that ruling. He identifies no evidence that he would have offered but didn't, and no evidence that he would have objected to but didn't. As for the jury instructions, plaintiff doesn't dispute King's argument that the trial court gave the same negligence-free instruction on King's liability that it would have given if the ORS 471.565(2) claim were still in the case – an instruction that, to recover against King, plaintiff had to prove only that King served alcohol to defendant Bunch while she was visibly intoxicated and that doing so caused injury to plaintiff:

> "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 [sic] – intoxicated[,] and, two, that Roland King's serving or presiding – providing alcohol to Diana Bunch while visibly intoxicated was a cause of damage to Plaintiff."

Tr 1649. Plaintiff doesn't contend that the trial court would not have given that instruction, if the statutory-liability claim had not been dismissed, or that it would have given some additional instruction.

Plaintiff does note that the trial court instructed the jury on the elements of negligence after instructing the jury that plaintiff didn't have to prove that King was negligent. Well, of course it did. There was a negligence claim in the case –

the claim against Bunch. The court had just instructed the jurors that, "[t]o recover against Defendant Bunch," plaintiff "must prove two things[:] * * * One, that the Defendant Bunch was *negligent* in at least one o[f] * * * the ways claimed in the Plaintiff's Complaint and, two, that Defendant Bunch's *negligence* was a cause of damage to the Plaintiff." Tr 1648-49 (emphasis added).[5] Having mentioned negligence in the Bunch-specific instruction, the court naturally went on to explain what negligence is. But, in doing so, the court didn't connect that explanation to the claim against King. Plaintiff's assertion to the contrary is just plain wrong. The court did not ever mention King and negligence in the same breath.

In the end, then, plaintiff got the same trial he would have gotten but for the dismissal of his statutory-liability claim. At least, he hasn't proven that he didn't.

[5] Because Bunch admitted liability, plaintiff did not, in fact, have to prove that she was negligent. But plaintiff did not except to this part of the instructions, no doubt for strategic reasons.

9. Conclusion

The Court of Appeals's decision should be reversed, and the trial court's judgment affirmed.

Respectfully submitted,

/s/ Thomas M. Christ

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For Petitioner on Review King

Certificate of Compliance with ORAP 9.05(3)(a)

Brief length

I certify that this brief complies with the 4,000-word limit for reply briefs on the merits in ORAP 5.05(2)(b)(i)(E), and that the word count of this brief as described in ORAP 5.05(2)(a) is 3,989 words.

Type size

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

/s/ Thomas M. Christ

_____

Thomas M. Christ

Certificate of Filing and Service

I certify that I filed the attached brief by electronic filing on July 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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