IN THE SUPREME COURT OF THE STATE OF OREGON

JASON CHAPMAN and RICHARD GILBERTSON,
Plaintiffs-Petitioners on Review,

v.

CARROLL MAYFIEILD, GRESHAM PLAYERS CLUB, and GRANT BAUGHMAN,
Defendants,

and

FRATERNAL ORDER OF EAGLES GRESHAM AERIE #2151 GRESHAM OREGON, dba Eagles Lodge #2151 Gresham,
Defendant-Respondent.

Multnomah County Circuit Court No. 101216919

Oregon Court of Appeals No. A150341

Supreme Court No. S062455

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

Review of the June 11, 2014 decision of the Court of Appeals
from a Multnomah County Circuit Court judgment, Honorable Karin J. Immergut.

Judges: Nakamoto, P.J.; Egan, J.; Lageson, J.; *Vice* Armstrong, J.
Opinion by: Lageson, J.
Dissenting Opinion by: Egan, J.

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I. Introduction

Eagles Lodge (defendant) over-served Carroll Mayfield, who was visibly intoxicated when he entered the bar, and Mayfield then violently harmed plaintiffs. There is no factual dispute respecting that over-service, and no factual dispute respecting Carroll Mayfield's visible intoxication at the time defendant over-served him. At issue in this case is whether plaintiffs' summary judgment evidence established a triable fact issue respecting the foreseeability of Mayfield's violence after he was over-served. In determining that plaintiffs' evidence did not, the trial court and Court of Appeals

(1) Disregarded the pleading and proof of the objective standard of "foreseeability" set forth in *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 734 P2d 1326 (1987) and *Stewart v. Jefferson Plywood Co.*, 255 Or 603, 469 P2d 783 (1970); and

(2) Misconstrued the applicability of cases involving violent harms caused by over-serving alcohol which each required foreseeability allegations or proofs respecting what a defendant *actually knew* but provided limited (perhaps erroneous) guidance on how to allege what a reasonable defendant should have known.[1]

[1] There are other compelling issues to address respecting the Court of Appeals decision in *Chapman v. Mayfield*, 263 Or App 528, 531, __ P3d __ (2014); however, this brief will be limited in scope to these issues.

II. Foreseeability applies to a general category of risks, not merely to a specific defendant's knowledge or direct experience of that risk.

The *Fazzolari* court determined that "the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a particular interest of the kind of harm that befell the plaintiff." *Fazzolari*, 303 Or at 17. Foreseeability, in turn, "is a judgment about a course of events, a factual judgment that one often makes outside any legal context[, and that judgment] * * * ordinarily depends on the facts of a concrete situation[.]" *Id.* at 2.

The *Fazzolari* court particularly highlighted in its opinion, a lengthy analysis of *Stewart v. Jefferson Plywood Co.* *Id.* at 11-14. After doing so, the court concluded that the element of foreseeability involves a "*generalized risk* of the types of incidents and injuries that occurred rather than *the predictability of the actual sequence of events*." *Id.* at 13 (emphasis added). It "is decided as an issue of fact." *Id.*at 2.

Referring further to Professor Vetri, author of *Tort Markings: Chief Justice O'Connell's Contributions to Tort Law,* 56 Or. L. Rev. 235, 241 n 24 (1977), the *Fazzolari* court recited that "it is important to recognize that the jury should consider *all* foreseeable risks of harm in making the unreasonableness balance and not be restricted merely to the risk related to the plaintiff." *Id.* at 14 n 12. In other words, "common law negligence imposes liability for harms

of the *general kind* and to plaintiffs of the *general class* placed at risk, harms that a reasonable factfinder, applying community standards, could consider within *the range of foreseeable possibilities.*" *Id.* at 13-14 (emphasis added).

Those legal standards do not limit a plaintiff to proving only what a specific defendant actually knew or directly experienced before a reasonable jury may determine that the plaintiff's harm was foreseeable. The "range of foreseeable possibilities" arises from "community standards"—indeed, it includes what a "reasonably prudent person" should know. *Stewart*, 255 Or at 609. ("[O]ne is negligent only if he, as an ordinary reasonable person, ought reasonably to foresee that he will expose another to an unreasonable risk of harm.") It can be determined irrespective of the defendant's personal knowledge and experience. And it is evaluated, not just through an analysis of the specific harm suffered by a plaintiff, but through an analysis of the types of harms that may befall a "general class" of persons like the plaintiff (i.e. others similarly situated). *Fazzolari*, 303 Or at 14 n 12.

Accordingly, the Court of Appeals wrongly decided that a plaintiff only may hold a tavern owner liable for its over-served bar patron's subsequent violence, if it is foreseeable "*to the tavern owner* that serving the person would create an unreasonable risk of violent conduct." *Chapman*, 263 Or App at 531 (emphasis added). That holding removes from the province of the jury a determination of what a reasonable tavern owner "ought reasonably to foresee"

respecting the generalized risk of harm to which plaintiffs (and people like plaintiffs) were exposed.

III. *Stewart v. Jefferson Plywood Co.* is illustrative.

In *Stewart v. Jefferson Plywood Co.*, the plaintiff was a volunteer firefighter who was battling a neighboring blaze from defendant's rooftop. *Stewart*, 255 Or at 605. During that effort plaintiff fell through a covered skylight on the roof and was injured. *Id.* The *Stewart* court first acknowledged that negligence liability generally does not arise from "conduct which causes harm through the concatentation of highly unusual circumstances" and that it was unlikely that "an injury would occur as a result of falling through a skylight and even less likely that one would fall through a skylight because it was covered in a manner that made it appear to be a solid part of the roof." *Id.* at 609-10. However, the court still concluded that "it cannot be said that this setting for possible injury is *so uncommon* that a jury could not reasonably describe as foreseeable the risk of harm which it creates." Most importantly, the court required no additional inquiry into what that defendant specifically knew about his skylight or whether that defendant had any specific knowledge about skylight injuries occurring after fires erupt.

The *Stewart* court concluded that the foreseeability of the plaintiff's injury was for the jury to decide:

The jury is given a wide leeway in deciding whether the conduct in

> question falls above or below the standard of reasonable conduct deemed to have been set by the community. The court intervenes only when it can say that the actor's conduct clearly meets the standard or clearly falls below it.

Id. at 607.

In this case, the reasonableness of the defendant's conduct is not at issue. Over-serving visibly intoxicated persons is already legislatively determined to be unreasonable. ORS 471.565 (2) (tavern owners liable to innocent third-parties injured by bar patrons over-served with alcohol when visibly intoxicated); *see, e.g., Nearing v. Weaver*, 295 Or 702, 709, 670 P2d 137 (1983). What is at issue here is whether the series of events following that unreasonable conduct were "*so uncommon* that a jury could not reasonably describe as foreseeable the risk of harm which it creates." Indeed, the *Stewart* court determined that, even without

> statistics showing the frequency with which persons are injured as a result of falling through skylights[, w]e know * * * from our general knowledge of the way in which injuries occur, that a covered skylight might well be considered as blameworthy within the community's sense of fault.

Stewart, 255 Or at 611.

In other words, general rather than specific knowledge can be imputed to the defendant when applying community standards of blameworthiness and determining the foreseeability of a plaintiff's harms. Those legal principles are controlling here.

IV. Plaintiffs' evidence was sufficient under *Fazzolari* and *Stewart*

Plaintiffs' allegations and evidence were sufficient to create a triable fact issue respecting the foreseeability of plaintiffs' injuries. First, plaintiffs alleged that it is common for intoxicated bar patrons to become violent and that defendant was in the business of serving alcohol and had reason to know that Mayfield, like any other intoxicated patron, might become violent if over-served. Third Amend Compl, ¶ 19; PFR, p. 5; *Chapman*, 263 Or App at 532.

Second, plaintiffs submitted evidence responsive to defendant's summary judgment motion which supported those allegations and created a genuine issue of material fact respecting whether his injuries fell within a general class of foreseeable risks associated with over-serving visibly intoxicated bar patrons. Plaintiff's medical expert testified "to a degree of reasonable medical certainty" that "intoxicated drinkers frequently become violent" and that "the link between visible intoxication and increased violent behavior has been well-established in * * * lay literature for decades, if not more than a century." *Chapman*, 263 Or App at 532. A neighboring bartender testified that he knew from experience that when bar patrons became violent, it was due to the intoxication. *Id.* at 533.

Under *Fazzolari* and *Stewart* that evidence along with all reasonable inferences arising therefrom, created a fact issue respecting what an ordinary reasonable alcohol server ought reasonably to know about over-serving visibly intoxicated patrons like Mayfield. It was for the jury to decide whether

defendant's conduct created a generalized risk of the type of harm plaintiffs suffered. Plaintiffs' injuries did not occur through a "concatentation of highly unusual circumstances;" rather, plaintiffs' evidence established that a reasonable alcohol server should have "general knowledge" about the possibility of violent injuries resulting from the over-service of alcohol.

Contrary to the Court of Appeals decision, the prevailing law of negligence does not require plaintiffs only to "show directly that *defendant knew* that serving alcohol to Mayfield while he was visibly intoxicated created an unreasonable risk that he would behave violently." *Chapman,* 263 Or App at 534 (emphasis added). Neither was it necessary for plaintiff only to supply evidence that defendant "was on notice of the fact [] that [specifically] serving Mayfield while he was visibly intoxicated created the unreasonable risk that he would become violent." *Id.* The defendant tavern owner's personal knowledge or direct experience of a particular bar patron's propensities for violence simply is not the *sine qua non* for properly alleging or proving the foreseeability of a plaintiffs' harms.

V. *Moore* should not suggest a departure from *Fazzolari* and *Stewart.*

The Court of Appeals majority relied primarily on *Moore v. Willis,* 307 Or 254, 767 P2d 62 (1988); *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988); and *Sparks v. Warren,* 122 Or App 136, 856 P2d 337 (1993) in issuing its decision in this case. *Chapman*, 263 Or App at 531-37. It further asserted in

a footnote:

> "[U]ntil the Supreme Court revisits its formulation of foreseeability in *Moore*[, statutorily-mandated alcohol server training respecting the link between violence and over-service] has no bearing on the issue that this case presents: whether plaintiffs' *evidence* was sufficient to establish that defendant knew or should have known that serving Mayfield while he was visibly intoxicated created an unreasonable risk that Mayfield would act violently."

Id. at 535 n 3.

Moore involved a Rule 21 motion against that plaintiff's wrongful death complaint and an analysis of the fact pleading requirements of ORCP 18. *Moore*, 307 Or at 256-59. Moore had alleged only that the defendant tavern owner's negligence "was the proximate cause of death of [his decedent]" because, among other things, the tavern owner had over-served a visibly intoxicated bar patron who next shot and killed plaintiff's decedent. *Id.* at 63-64. The *Moore* court did not base its analysis on what facts of foreseeability a jury must determine in light of community standards, or what settings cannot be said to be "*so uncommon* that a jury could not reasonably describe as foreseeable the risk of harm which it creates." Rather, it acknowledged that

> It may be common for intoxicated and underage drinkers to become violent. If violence is common among intoxicated and underage drinkers, those who are in the business of serving alcohol and who frequently observe people's reaction to alcohol may have reason to foresee the type of harm that arose in this case. *At the pleading stage*, however, a court cannot simply assume that it is common for intoxicated or underage drinkers to become violent in order to support an inference that violence is a foreseeable result of serving alcohol to someone who is intoxicated.

Id. at 260-61.

For purposes of properly alleging that a plaintiff's injuries were a foreseeable result of a defendant tavern's over-service of alcohol, two principles could arise from that holding: (1) A plaintiff must allege facts from which a court (and, subsequently a jury) might infer that it is common for intoxicated drinkers to become violent after being over-served; or (2) A plaintiff must allege facts from which a court (and, subsequently a jury) might infer that "those who are in the business of serving alcohol and who frequently observe people's reaction to alcohol have reason to foresee" that a bar patron might become violent and harm people after being over-served with alcohol.

If the court stopped there, this case arguably would not be before this court. Plaintiffs' complaint satisfied both of those pleading requirements. However, it is the application of the *Moore* court's subsequent efforts to describe adequate factual allegations of foreseeability which appears to have done the most mischief with the generally accepted principles of foreseeability articulated in *Fazzolari* and *Stewart*.

The court first notes that merely alleging that a defendant "knew or should have known" of a particular risk, standing alone, may not sufficiently allege foreseeability; however, "[w]hen a plaintiff claims that a risk was foreseeable, though not necessarily foreseen, the plaintiff must allege facts that would allow the factfinder to conclude that *the defendant* should have known of

the risk." *Id.* at 64.

This statement might still have retained the concept that what a defendant "should have known" means "what an ordinary reasonable person (in defendant's position) ought reasonably to foresee." But the *Moore* court next cited *dicta* from *Reynolds v. Nichols*, 276 Or 597, 556 P2d 102 (1976), which appeared to limit the pleadings and proofs of foreseeability in liquor liability cases:

> If the complaint had alleged that defendants served intoxicating liquors to Simmons [the defendants' guest] with reason to know that the combination of liquor and *Simmons' violent propensities* would prompt him to assault plaintiff, it is arguable that a cause of action might have been stated.

Id. (emphasis added).

The *Moore* court next similarly concluded that Moore had not alleged any other facts suggesting that the over-served bar patrons in his case would become violent; accordingly, there were insufficient allegations from which a fact finder could infer that *the tavern owner* "had reason to know that serving alcohol to [the over-served bar patrons] would cause them to become violent." *Id.* 307 Or at 65-66. Even though this should have been restricted to the pleading defects in that particular case, *Moore* appears to require factual allegations establishing foreseeability only through the eyes of the defendant tavern owner and only through what that defendant actually knows about a particular bar patron. In other words: without regard for any community

standard for what an *ordinary reasonable person* in defendant's position *ought to know* and *ought reasonably to foresee*.

In applying *Moore*, the Court of Appeals repeated that same analytic omission. Despite plaintiffs' allegations and evidence supporting what an ordinary reasonable alcohol server ought to know and foresee, the Court of Appeals concluded that plaintiffs' factual allegations and evidence

> do not show *directly* that defendant knew that serving alcohol to Mayfield while he was visibly intoxicated created an unreasonable risk that he would behave violently. Accordingly, under *Moore*, the question is whether it rationally can be inferred from those facts that defendant should have known—that is, was on notice of the fact—that serving Mayfield while he was visibly intoxicated created the unreasonable risk that he would become violent. It cannot.

Chapman, 263 Or App at 534 (emphasis added).

That is erroneous. Under *Fazzolari* and *Stewart*, the law of negligence does not take away from the jury a proper determination of the range of harms reasonable persons ought to know and ought to foresee could result from their unreasonable conduct.

The *Chapman* formulation reduces a plaintiff's proof of foreseeability to a subjective rather than an objective standard with culpability arising only from how much (or how little) alcohol servers know. As so applied, and as the *Chapman* majority seems to imply here, any negligent over-service of violent bar patrons may be excused by self-serving testimony that the alcohol server(s)

(1) did not know of any link between intoxication and violence; (2) have never seen any drunk people become aggressive or violent; (3) work somewhere where people never show any signs of violence; or (4) thought the defendant bar patron was a "sweet, mellow guy who never showed any aggressive tendencies before the night he killed the plaintiff."[2]

A jury's determination of community standards applicable to the generalized category of harms within a "*range of foreseeable possibilities*" should not be this vulnerable to attack. It most certainly should not be available to plaintiffs only when it can be shown that a defendant has ignored the obvious.

VI. *Hawkins* and *Sparks* do not apply here.

On the same day as *Moore*, this court issued its opinion in pleadings case arising from liquor liability claims brought against a tavern owner who allegedly over-served subsequently violent bar patrons. 307 Or at 264. The *Hawkins* court determined, again, that the plaintiff had improperly alleged his

[2] As Judge Egan deftly points out in his dissent, alcohol servers are required by Oregon law to be trained in the link between intoxication and violent or aggressive behaviors in certain persons. *Chapman*, 263 Or at 542-43 (Egan, J. dissenting). It might be suggested that people with violent or aggressive tendencies usually do not arrive at the bar announcing that they are one such person. As is often the case, the violent propensities do not show up until it is too late. It seems ludicrous, then, to disregard this mandatory training or to limit its efficacy in negligence actions to whether or not *this* alcohol-server could identify *that* type of person before choosing to over-serve him/her.

[3] Both opinions were authored by Justice Campbell.

common law negligence claim because "plaintiff failed to allege foreseeability." *Id.* at 269.

The *Hawkins* court first determined that the only allegations in support of plaintiff's common law negligence claim were the allegations that the tavern owner "was negligent in failing to call the police to eject [the drunk and violent patrons] when they became assaultive and in failing to protect the plaintiff when he left the tavern. *Hawkins*, 307 Or at 268. That doesn't quite do the plaintiff's allegations justice. The plaintiff also alleged the negligent over-service of alcohol to those visibly intoxicated patrons, that the failure to call the police and eject the patrons should have been responsive to their having thrown "chairs across the bar and threatened patrons * * * with pool cues," and that the failure to protect plaintiff after leaving the bar was because plaintiff had left at or near the same time the unruly patrons had been "ejected for their violent and drunken behavior." *Id.* at 264.

The court determined that the plaintiff's allegations of foreseeability were insufficient because the plaintiff

> did not allege that the *defendant knew* about the threats and unruly conduct or that the defendant otherwise *had reason to know* of Shively's violent propensities at the time the defendant served alcohol to Shively and his companions. Without alleging facts that would allow a jury to determine that *the defendant should have foreseen the risk of harm*, the plaintiff cannot state a common law

negligence claim.[4]

Id. (emphasis added) (citing *Moore*).

Although it may be curious why that plaintiff wasn't afforded the reasonable inference from his allegations that the bartender might have known of the unruly conduct when chairs came flying across the bar, the court's reiteration of the *Moore* pleading requirement is evident: a defendant's conduct may only be negligent to the extent that a defendant actually knows it might be. There is no further mention that what a defendant "should have known" arises from what an *ordinary reasonable person* in defendant's position generally *ought to know* and *ought reasonably be able foresee*.

Sparks, unlike *Moore* and *Hawkins*, addresses factual evidence in a summary judgment motion. However, Sparks only had alleged various negligence specifications addressing the service of alcohol to, and without the proper supervision of, minors. 122 Or App at 138-39. The Court of Appeals cited *Moore* and concluded that

> "[Sparks] presented no evidence in response to defendants' motion[, arguing that they could not foresee the subject minor becoming violent after drinking alcohol,] that would show that defendants knew or should have known that * * * underage drinkers or Warren would become violent." *Id.* at 139.

The court doesn't describe what evidence plaintiff presented, and doesn't

[4] There are a multitude of errors that could be raised respecting this holding. However, addressing each of those is beyond the scope of this brief.

particularly elaborate whether it was looking exclusively for evidence of actual knowledge, or evidence of what a reasonable defendant ought to know in these circumstances. However, the court aptly notes the absence of any allegation or evidence of intoxicated minors becoming violent when it determines that "[t]he risk flowing from the negligence alleged here is not that a minor will drink but that someone predictably will be exposed to danger of an assault if defendants were negligent as alleged." *Id.* at 140. The plaintiff's negligence allegations implicated nothing other than defendant negligently permitting underage drinking without proper supervision. Accordingly, without more, the reliance on *Moore* applies: "The fact that someone is visibly intoxicated or underage, standing alone, does not make it foreseeable that serving alcohol to the person creates an unreasonable risk that the person will become violent." *Id.* at 139.

Neither *Hawkins* nor *Sparks* apply here. First, plaintiffs' allegations are sufficient and follow the requirements of *Moore*. Second, plaintiffs in this case *did* produce evidence of what an *ordinary reasonable person* in defendant's position *ought to know* and *ought reasonably be able foresee*. Arguably, neither *Hawkins* nor *Sparks* purport to address those types of allegations or evidence.

VII. The Court of Appeals wrongly held plaintiffs to the standard of what defendant did know rather than what a reasonable defendant should know.

The Court of Appeals decision in this case seems to render the totality of

Moore, *Hawkins*, and *Sparks*, to compel the conclusion that juries may no longer decide whether a defendant's over-service of alcohol to a visibly intoxicated patron was reasonable created a "generalized risk" of violent harm to third parties, including plaintiff, which was in the "range of foreseeable possibilities" to a reasonably prudent alcohol server. It eliminates the legitimacy of pleading or evidentiary facts addressing what a reasonably prudent alcohol-server should have known about the link between intoxication and violence. It seems to require the allegation and proof only of specific facts of (1) a particular alcohol-server's direct knowledge, and (2) direct knowledge about a particular patron's propensities for violence.

Under *Fazzolari* and *Stewart*, that view of foreseeability is too narrow. It eliminates a jury's application of community standards which require people to act reasonably and to be aware of a range of possible harms that may result when they don't. Neither *Fazzolari* nor *Stewart* limit plaintiffs' evidence of foreseeability only to the alcohol server's direct knowledge either of Mayfield's violent tendencies or of the violent propensities of the tavern's patronage more generally, as was done here. Ultimately, it is for a jury, and not the defendant, to determine whether the harms a plaintiff suffered were not "so uncommon" as to be unforeseeable.

VIII. Conclusion.

Based on the forgoing, this court should limit *Moore*, *Hawkins*, and

Sparks to their facts, involving primarily pleading defects; clarify its holding in *Moore* as applying only to allegations of what a particular defendant did know as opposed to allegations of what an objectively reasonable defendant "should have known;" or disavow *Moore* as no longer being good law in light of the legislature's mandatory requirement that alcohol servers be educated and trained in the understanding that intoxication (and the negligent over-service of alcohol) is strongly linked to subsequent personality changes, aggression, and violence. *See*, *Chapman*, 263 Or at 542-43 (Egan, J. dissenting) (describing OLCC mandatory alcohol server training required by law).

Respectfully submitted on this 4th day of December, 2014,

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CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is **3,965** words.

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

CERTIFICATE OF SERVICE AND FILING

I certify that on this date I electronically filed the foregoing **BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator and by so doing either caused a true copy to be served electronically on the following parties or served them by conventional email should the system have failed to provide such service:

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