IN THE SUPREME COURT OF THE STATE OF OREGON

JENNIFER J. BAKER,
Personal Representative of the Estate of Tyler R. Baker,

Plaintiff-Appellant,
Respondent on Review,

v.

MATTHEW A. CROSLIN,

Defendant-Respondent,
Petitioner on Review,

and

TYLER GREGORY SMITH,

Defendant.

Court of Appeals
A151932

S062571

RESPONDENT JENNIFER J. BAKER'S BRIEF ON THE MERITS ON REVIEW

Petition for Review of the Decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Multnomah County,
Honorable Eric L. Dahlin, *pro tem* Judge.

Court of Appeals Opinion Filed: July 9, 2014
Disposition: Reversed and Remanded
Author of Opinion: J. Lagensen
Concurring Judges: Duncan and Wollhein

January 2015

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RESPONDENT'S BRIEF ON THE MERITS ON REVIEW

I. STATEMENT OF THE CASE

A. Nature of the Proceedings and Relief Sought

Respondent/plaintiff Jennifer J. Baker is the widow and Personal Representative for her deceased husband, Tyler Baker. She brought a wrongful death action against petitioner/defendant Mathew Croslin, and against Tyler Smith, who no longer is in the case. At Croslin's home, at a hosted drinking party, a visibly intoxicated Smith accidentally shot Tyler Baker, killing him. The trial court entered summary judgment against plaintiff, and the Court of Appeals reversed that judgment, finding there was evidence Croslin provided alcohol to a visibly intoxicated Smith, not needing to reach the separate question of whether there was evidence that Croslin negligently failed to control activities at his party.

B. Questions Presented on Appeal

1. In Oregon, a homeowner must exercise reasonable care for the protection of guests, regardless if drinking is involved or not. Could a jury conclude that a homeowner was negligent for encouraging a guest to load his handgun with hollow-point rounds, and for then encouraging his guests to engage in gunplay? Could a jury conclude that was an unreasonable activity in the home?

2. Could a jury conclude that under ORS 471.565 a social host is liable if the host provided alcohol, by inadequate control of the flow of his alcohol at his

party, for that guest to consume when the guest was visibly intoxicated? Here, the guest (the shooter) consumed seven to ten drinks. The homeowner provided the first two drinks, the shooter consumed only two beers of his own, and would have been visibly impaired after four drinks. Nevertheless, the homeowner provided hard liquor for three to six more drinks.

3. Does ORS 471.565 immunize a social host from all other liability based on all other unreasonable conduct if plaintiff cannot prove the host served the shooter while he was visibly intoxicated, thereby transforming the statute into an affirmative defense against non-alcohol torts?

C. Material Facts for Determination on Review

Petitioner on Review ("Petitioner") has not followed the correct standard of review in his fact statement. In reviewing the facts on summary judgment, the Respondent is allowed all inferences from the facts, and the facts should be stated in the light most favorable to Respondent, including any reasonable inferences. *Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608, (1997). Petitioner repeatedly spins the facts his way rather than stating them in the light most favorable to Respondent.

On the evening of Baker's death, Croslin invited friends to his house. (ER 15-16.) In addition to Smith and Baker, six other guests were present during

earlier parts of the evening (but not at the time of the shooting). (ER 16, 21, 23-24.) A jury could find that Croslin's gathering was a party.[1]

The party was not BYOB. Croslin supplied his guests with several choices of hard-alcohol (Petitioner argues it was only vodka). Under his bar, he had an "assortment" of alcohol, including rum (not just the Cockspur rum). (ER 17.) In his freezer, he had vodka. (ER 18-19.) In Croslin's house, his friends were expected to help themselves. (*See* ER 20 (referencing food).) Smith, for example, knew he "[was] welcome to" mix drinks with Croslin's alcohol. (ER 37-38.) Also, Croslin specially purchased Cockspur rum for the party. (ER 17-18.) Although Croslin claims to have been reimbursed by Baker for the Cockspur, Croslin admits purchasing it and bringing it into his home for consumption at the party. (ER 18.)

When Smith arrived, he contributed "two or four" sixteen-ounce cans of light beer. (ER 9-10.) The Court therefore can assume he contributed two.

At Croslin's party, Smith quickly drank to intoxication. Smith arrived at the house around 7:30 p.m. (*See* ER 6.) Smith arrived sober (ER 38), but he consumed alcohol over the next two hours (ER 12 (9-1-1 transcript showing call at

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[1] Respondent states the facts in the light most favorable to her and takes all reasonable inferences, as is required on summary judgment. *See Petock v. Asante*, 351 Or 408, 411 n 1, 268 P3d 579 (2011).

9:33 p.m.)). Based on blood alcohol tests performed later by the police, plaintiff's expert will testify that Smith had a blood alcohol content of 0.18 to 0.20 by the end of that two hours, had consumed 7 to 10 drinks, and would have been visibly intoxicated. (*See* ER 1-2 (ORCP 47 E declaration).) In particular, Smith would have been exhibiting "significant motor impairment and speech impairment." (*Id*.) Plaintiff's expert would further testify that, for any drink Smith had beyond his fourth drink, Smith would have been visibly intoxicated. (P Tr 10-12.) Smith testified that only two of his drinks were beer, and therefore, five to eight were Croslin's hard liquor. (ER 35.)

The other drinks, besides the two light beers, Smith consumed to reach a BAC of 0.18 to 0.20 were all hard alcohol. Smith admits to consuming two cocktails of vodka and Squirt, each mixed from the vodka in Croslin's freezer. (ER 37, 38.) There is inconsistent testimony about whether Smith had a shot of rum or whiskey. (ER 35 (testifying it may have been whiskey); ER 36 (claiming it was rum); ER 6-7 (Smith omitting reference to shots altogether).) If Smith's shot was rum, it may have been from the bottle of Cockspur that Croslin purchased for consumption at the party or it may have been rum Croslin already had under his bar. (ER 17, 36.) If it was whiskey, it was Croslin's whiskey, and Croslin effectively provided all the hard alcohol.

Beyond those four or five drinks, Smith cannot account for his alcohol consumption:

> Q * * * [I]f Matt Croslin says * * * [you, Smith] drank the two vodka Squirts first and then the two beers, are you going to disagree with him, or you just don't know?
>
> A. You know, it was—you know, we are mixing and drinking, and drinking beers and playing cards. And *I don't know if that's the exact amount of alcohol we drank*. I don't know what order it was in.

(ER 39 (emphasis added).) Smith's shot came last. (ER 35.)

There were guns at the party. Before guests arrived, Croslin laid out his own handguns, including a Taurus .357 and a Ruger LCP (lightweight compact pistol). (ER 13, 25.) Even as people came and went, Croslin made no effort to remove or secure his guns. (*See* ER 28 (effort to remove guns came only seconds before shooting).) Indeed, that evening, Croslin intentionally displayed the guns; he wanted to show them off to his friends. (ER 25.) In addition to the weapons Croslin supplied, both Baker and Smith were armed. (ER 26, 34.)

During the evening, Baker and Smith both unholstered their weapons. Croslin cannot remember why Baker pulled his weapon. (ER 26.) As to Smith, around 8:30, Croslin provided Smith new and more deadly bullets. (ER 2, 27.) The clip in Smith's gun had "full metal jacket" rounds (ER 31), and there was no round in the chamber (*see* ER 9 (noting Smith's habit)). Croslin had a box of

Magtech Guardian cartridges, which are hollow-point ammunition designed to cavitate (create a larger wound cavity). (ER 14, 32.) Croslin encouraged Smith to load his weapon with the Magtech hollow-point bullets. (ER 32). Croslin observed as Smith "physically undid every single bullet, all six" from his "magazine," and replace those bullets with the Magtech hollow-point bullets. (ER 27.) Smith then installed the magazine back in his weapon. (ER 33.)

Later, the conversation again turned to guns—"what's the best position to carry, what's the best caliber, * * * things of that nature." (ER 24.) For the next 20 minutes, the three men acted out scenarios where they pretended to be held up. (ER 8.) Smith explained:

> * * * And we started to get in the scenarios of you know so give me your wallet. And you know how we would co-act with somebody trying to rob us or you know we were just doing the scenarios and you know we did that for awhile. * * *.

(*Id*.) Each of the three demonstrated drawing their weapons from where they habitually carried—Croslin from a side holster, Smith from his left pocket, and Baker from his waistband. (ER 8, 34.)

Croslin knew at the time that the gunplay activity was dangerous:

> You know, we played the scenarios and I got a little scared, obviously. You know, the guns came out and *I was like okay, bad idea*, and I went and picked up my weapons and took them back to my bedroom.

(ER 28 (emphasis added).) He did so after deciding "I'm not going to deal with this." (ER 4.)

At about 9:30, Croslin left Baker and Smith still play-acting fake holdups with real guns. (ER 4.) Smith didn't mean to shoot Baker. (ER 40-41.) But he fired a single, newly loaded, Magtech hollow-point bullet into Baker's right lung. (ER 11, 41.) Baker died. (ER 11.)

In the aftermath of shooting Baker, Smith was unable to account for the presence of a Magtech bullet in his weapon's chamber:

> [Q.] And you don't remember pulling the slide back?
>
> [A.] Never.
>
> [Q.] Or charging the chamber?
>
> [A.] Nope.

(ER 10.) One reasonable inference is that, in his intoxicated state, Smith chambered a round when he loaded the Magtech "hollow-point" bullets. And further, it is reasonable to infer that Croslin observed this (or, but for his own intoxication, should have observed it). (*See* ER 27 (Croslin observed as Smith replaced "every single bullet, all six" from his "magazine").) Regardless, there is no evidence that Croslin—despite encouraging Smith to handle his gun and knowing Smith was drinking—took any steps to prevent Smith from chambering a Magtech bullet after Croslin provided the hollow-point rounds.

Despite petitioner's statement to the contrary, Baker's gun was not loaded during the gunplay. The police found Baker's gun on the table, unloaded, after the shooting, throwing doubt onto Smith's story that Baker pointed a loaded gun at him. (Officer Holtzhausen Special Report, Kitchel Dec. ¶6).

Mixing alcohol and guns is unreasonable. That night, Croslin admitted that it was "probably not the best idea to be out drinking and, you know[.]" (ER 3.) Indeed, that is why Croslin decided "I'm gonna go put mine away 'cause it's not even worth it for anything to happen * * *." (*Id*.) The police found Croslin's pistol hidden in the bedclothes, and not in his drawer, as he testified. (Beniga's Continuation Report, Kitchel Dec. ¶6). At trial, plaintiff will provide expert testimony that, "in the reasonable handling of firearms, one should never handle a firearm while intoxicated[.]" (ER 2.)

But even if Croslin's guests hadn't been intoxicated, a fact issue exists about whether Croslin permitted unreasonable activities in his living room. At trial, plaintiff would provide expert testimony that "in the reasonable handling of firearms, * * * one should never point a loaded weapon at another person (unless intending to kill that person), and that all firearms should be treated as loaded weapons." (*Id*.)

In sum, a jury could reasonably find as fact that (1) Croslin provided all the hard liquor that Smith drank, including the last shot; (2) Smith drank to the point of

visible intoxication and beyond at Croslin's party; (3) Croslin gave Smith the hollow-point bullets and, upon reasonable inference, knew or should have known Smith chambered a round; (4) Croslin encouraged, permitted, and joined in the display of guns at this party; (5) Croslin encouraged, permitted, and joined in play-acting hold-up scenarios with real guns; (6) Croslin knew that the gunplay was dangerous; and (7) Croslin did nothing to stop the gunplay of his intoxicated guests.

D. Summary of Argument

A homeowner, or the person in charge of any premises, has a duty to reasonably control activities on the premises. There is evidence that petitioner Croslin supplied and controlled the liquor and provided it to Smith when he was visibly intoxicated. The common law duty to control activities on the premises and make the premises safe is not extinguished by ORS 471.565 just because alcohol was consumed. So there are two separate routes to liability, either one of which can result in a jury verdict for plaintiff: 1) over service of alcohol; that is, provision of alcohol by the homeowner to a shooter who was visibly intoxicated, and/or 2) an unreasonable failure to control and prevent unsafe activities on the premises. Of course the provision of even some alcohol makes otherwise unsafe activities even more so.

II. ARGUMENT

A. Controlling Activities on the Premises

Croslin, as a homeowner, failed to exercise reasonable care when he (a) encouraged his guest to load his gun with hollow-point rounds; (b) knew or should have known that the guest chambered a round; and (c) encouraged and permitted his guests' gunplay, or failed to call a halt to it.

A social guest, in a home, has the status of a licensee, and the homeowner host can be liable for negligently conducting activities there. *Blystone v. Kiesel*, 247 Or 528, 529, 431 P2d 262 (1967)(a person running through a room knocked a guest down). Liability can stem from permitting an activity, and active participation in the activity isn't necessary. *Ragnone v. Portland Sch. Dist.*, 291 Or 617, 619, 633 P2d 1287 (1981)(a social guest at a school was knocked down by boisterous students). Simply permitting an activity is not "passive" negligence. This Court explained that "passive negligence" only refers to physical conditions of the land. *Id*. at 622.

The presence and consumption of alcohol doesn't change the duty to control the premises, and some alcohol simply colors the reasonability of the activities on premises. In *Whelchel v. Strangways*, 275 Or 297, 301, 550 P2d 1228 (1976), the Supreme Court expressly held that a tavern-owner could be liable for on-premises injuries. While patronizing the Wren Tavern, the plaintiff in *Whelchel* was

attacked with a pool cue by another patron of the bar. *See id.* at 300-01. The plaintiff did not plead or prove that the attacking patron had been overserved by the bar. *See id.* at 300. The plaintiff sued the owners of the bar, alleging that their negligence in failing to police their bar caused the plaintiff's injuries. *See id.* at 299. Defendant moved for a directed verdict, arguing that there was insufficient evidence for a jury to find that the defendants had been negligent. *Id.* The trial court denied the defendant's motion and the Supreme Court affirmed. *Id.* at 301. In doing so, the Court emphasized that "[w]hether [the defendants] should have attempted to stop the fight, to eject the fighters from the premises, and to prevent [the assailant] from using the pool cue as a weapon were all questions for the jury." *Id.* at 301.

To illustrate how lower courts have applied those principles, the Court of Appeals, in *Ollison v. Weinberg Racing Ass'n, Inc.*, 69 Or App 653, 688 P2d 847 (1984), considered the issue of foreseeability in the context of harm caused in part by intoxicated guests. In *Ollison*, the plaintiffs patronized the Portland Meadows Race Course on "Fan Appreciation Night"—appreciation meant half-priced beer. *Id.* at 655. An unruly patron "fired a gun," which "caus[ed] a stampede of other patrons." *Id.* The Court reasoned that if the conduct caused foreseeable harm, liability could attach.

Indeed, Croslin himself recognized as much: "You know, the guns came out and *I was like okay, bad idea*[.]" (ER 28.) The risk of each activity was heightened by his guests' intoxication. And again, Croslin admitted that: it was "probably not the best idea to be out drinking and, you know[.]" (ER 3.) Because Baker was a licensee on Croslin's premises, Croslin "is liable for injuries to [Baker] caused by the activities on the property if [Croslin] failed to use reasonable care to protect [Baker]." Uniform Civil Jury Instruction No. 46.07 (regarding premises liability).

So, regardless of the amount of alcohol, there is evidence in the record that Croslin failed to make activities in his house reasonably safe for his guests.

B. Overservice

The Oregon legislature created a statutory claim against those who fail to timely "cut off" a patron or guest. In pertinent part, this modern version of dram shop acts, ORS 471.565 provides social host liability:

> (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 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 [*sic*]; or
> > >
> > > (C) Facilitating the consumption of alcoholic beverages by the patron or guest in any manner.

ORS 471.565 (emphasis added). A plaintiff need not prove that a guest was "visibly intoxicated" through direct evidence. For example, in *Campbell v. Carpenter*, 279 Or 237, 242-43, 566 P2d 893 (1977), a bar patron consumed eight beers over approximately two hours, became confrontational with individuals, drove recklessly, and, eventually, struck and killed two people with her car. Expert testimony established that approximately two hours after leaving the tavern, the driver had a blood alcohol content of 0.24 percent. *Id*. The Oregon Supreme

Court held that "[w]e believe that the trial court could have properly found from this evidence that defendants' bartenders had continued to serve beer to [the driver] after she was 'visibly' intoxicated." *Id*. at 243.

Here, as in *Campbell*, there is sufficient evidence from which a jury could infer that plaintiff consumed alcohol while "visibly intoxicated." In particular, plaintiff's expert is prepared to testify that, based on blood alcohol tests performed later by the police, Smith's approximately two hours of drinking raised his BAC to 0.18 to 0.20. (ER 1-2.) In order to reach that level of intoxication, Smith would have needed to consume 7 to 10 drinks. (*Id*.) That consumption of alcohol would have resulted in Smith appearing visibly intoxicated, including "significant motor impairment and speech impairment." (*Id*.) Further, Smith demonstrated "unusual conduct" (leveling his weapon at a friend) and a "[l]ack of muscular coordination" (accidentally shooting Baker). *See State v. Clark*, 286 Or 33, 39-40, 593 P2d 123 (1979) (setting forth same as common physical manifestations of intoxication).[2]

And here, as in *Campbell*, there is sufficient evidence from which a jury could infer that Croslin "provided" alcohol to Smith while Smith was intoxicated.

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[2] The Oregon Supreme Court took judicial notice of various common physical manifestations of intoxication: "(1) Odor of the breath (2) Flushed appearance (3) Lack of muscular coordination (4) Speech difficulties (5) Disorderly or unusual conduct (6) Mental disturbance (7) Visual disorders (8) Sleepiness (9) Muscular tremors (10) Dizziness (11) Nausea." *Clark*, 286 Or at 39-40.

The party was not strictly BYOB as argued by Croslin. Smith did consume two light beers he brought. (ER 35.) But the rest of Smith's intoxication resulted from his consumption of hard alcohol Croslin provided. (ER 35, 36, 37, 38, 39.) Some of that hard alcohol was vodka, which Croslin furnished for his guests. (ER 37, 38.) Some of that hard alcohol may have been rum, which Croslin specially purchased for the party—albeit for reimbursement by a guest. (ER 17, 18, 35, 36.) Based on the expert testimony, Smith's consumption of alcohol, Smith's lack of memory of how, when, or why he chambered a bullet, and the shooting itself, a jury reasonably could infer that Smith was visibly intoxicated before he stopped drinking hard alcohol.

Plaintiff anticipates that, for purposes of this appeal, Croslin will not contest that there is evidence that Smith continued to consume alcohol after becoming "visibly intoxicated." There is no evidence that Smith was not visibly intoxicated. Similarly, Croslin has not appealed the holding that Baker did not contribute to Smith's drunkenness.

Croslin asks this Court not to expand social host liability. But all this Court needs to do is to interpret the legislature's intent from its plainly stated words in ORS 471.565, using this Court's own precedent. A social host is liable if he "served or provided" alcoholic beverages to a guest while the guest was visibly intoxicated.

Those words are not defined in ORS 471.565. But, consistent with the familiar statutory interpretation methodology established by *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993), this Court generally gives words of common usage their "plain, natural, and ordinary meaning." In the context of ORS 471.565, "provide" means "to supply for use." *Webster's Third New Int'l Dictionary* 1827 (unabridged ed. 1993).

Here, Croslin supplied his guests with hard-alcohol. Rum and vodka were available under his bar and in his freezer, respectively. Given that Croslin expected his friends to enjoy his food and alcohol, (ER 20 (referencing food); ER 37-38 (alcohol)), a jury could reasonably conclude that Croslin "suppl[ied] [vodka] for [his guests'] use." Similarly, Croslin cannot avoid liability even if—despite conflicting evidence—this Court were to conclude that (a) the only hard alcohol Smith consumed after being visibly intoxicated was rum and not whiskey, and (b) the rum came from the bottle Croslin specially purchased for use at the party. (ER 17-18, 35, 36.) Croslin still "provided" the alcohol.

ORS 471.565 confers liability on social hosts for either "serving" or "providing" alcohol. There is no evidence that Croslin poured Smith's drinks and handed them to Smith— "serving" —but Croslin did provide the alcohol. Oregon, and other states, look to facts showing that a social host had some control over the flow of alcohol. In *Solberg v. Johnson*, 306 Or 484, 490, 760 P2d 867 (1988) a

stepfather bought drinks in a tavern for his stepson, thereby "direct[ing] the serving of alcohol to guests," even though the bartender or server presumably "served" the drinks. The key to whether a social host provided the alcohol is the amount of control the host could exert over the flow of alcohol, and "the decision as to the amount of actual control rests with the trier of fact, not the court." *Solberg,* 306 Or at 492.

Those principles had been applied earlier in *Wiener v. Gamma Phi, ATO Frat.,* 258 Or 632, 485 P2d 18 (1971). The fraternity had actual control over the service of alcohol, and could be liable. *Id*. at 643. The guest ranch and the remote seller of alcohol had no control over the service, and so were not providers and could not be liable. *Id*. at 641.

As pointed out by the Court of Appeals, other states apply similar control standards. In *Juliano v. Simpson,* 461 Mass 527, 962 NE2d 175 (2012) the intoxicated driver consumed only his own alcohol, and none of the host's alcohol, and there was no evidence the host had any control over the consumption. In *Knight v. Rower,* 170 Vt 96, 742 A2d 1237 (1999), defendant landowners were not present at the party, and had no control over the service or consumption of alcohol.

In other cases, social hosts were held liable even though they didn't "serve" the alcohol, but indeed helped provide it. In *Delfino v. Griffo,* 150 NM 97, 257 P3d 917 (2011) the New Mexico Supreme Court held that pharmaceutical

representatives could be liable for buying drinks for an intoxicated guest in a bar. Those social hosts provided the alcohol even when "the actual service of alcoholic beverages is performed by licensed servers." 257 P3d 924.[3] The New Mexico court stated, "social hosts are those who exercise control over the alcohol service." 257 P3d 925.

Similarly, in *Born v. Mayers,* 514 NW2d 687 (ND 1994) the North Dakota Supreme Court held that a social host could be liable after buying some drinks for a tort-feasor in a bar and then some beer that was served at another person's home.

In our case, Croslin provided most of the alcohol Smith drank, including all the hard liquor, and Croslin never took steps to "cut off" Smith. A jury rightfully could conclude that Smith was visibly intoxicated, that Croslin controlled the flow of alcohol, or had the right to, and that Croslin thereby provided the alcohol.

In sum, the trial court erred in granting summary judgment. A genuine issue of material fact exists as to whether Croslin, as a "social host," is liable for "damages caused by [Smith, an] intoxicated * * * guest[]" because Croslin did not stop "provid[ing]" Smith alcohol—whether directly or indirectly—after he was "visibly intoxicated." This Court needn't "expand" social host liability, but just apply well established precedent to these facts.

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[3] The New Mexico court relied heavily on *Solberg, supra.*

C. The Presence of Some Alcohol Doesn't Extinguish the First Duty

Oregon long has recognized that even those who "dispens[e] intoxicating liquors and furnish[] entertainment" owe to their patrons and guests the "exercise [of] reasonable care to protect them from injury at the hands of a fellow guest or guests[.]" *Peck v. Gerber*, 154 Or 126, 135, 59 P2d 675 (1936). *Cf. Ollison*, 69 Or App 653 (racetrack potentially liable for injuries caused during stampede caused by patron firing gun during fan appreciation night); *Whelchel*, 275 Or 297 (bar potentially liable for injuries caused by failing to police bar patron who attacked another patron with pool cue). For example, in 1936, the Oregon Supreme Court upheld a jury verdict in favor of a patron who was injured after a fight erupted between two patrons, at least one of whom had been drinking. *Peck*, 154 Or 126. One among the viable claims was that, on the evening of the fight, the restaurant—which regularly provided a "special officer" "'for the protection of [its] customers'"—had failed to provide "an employee * * * to maintain proper order and to exercise reasonable care for the safety, comfort and entertainment of the guests." *Id*. at 130-31.

Yet, before the trial court, Croslin argued that, when the Oregon legislature enacted ORS 471.565 (and its predecessor ORS 30.950), it eliminated plaintiff's common law claims <u>not</u> premised on the overservice of alcohol. To Croslin, that statute nullifies his other tortious contributions to Baker's death because Croslin

provided some alcohol to Smith, his joint tortfeasor—but just not too much. Croslin's argument is not logical.

As the Oregon Supreme Court has recognized, the modern statutory overservice claim has its roots in Oregon's Dram Shop Act, enacted in the early twentieth century. *See Gattman v. Favro*, 306 Or 11, 16, 757 P2d 402 (1988) (discussing same). That early statutory claim belonged only to the family of the injured intoxicated person. *Id*. So, for other plaintiffs, the common law filled the void. *See, e.g.*, *Peck*, 154 Or at 135 (upholding verdict for plaintiff based on various unreasonable conduct). And, in 1977, the Oregon Supreme Court recognized an exception to the ordinary foreseeability hurdles a third-party would face bringing a claim against a purveyor of alcohol for off-premises injuries: "a tavern keeper is negligent if, at the time of serving drinks to a customer, that customer is 'visibly' intoxicated because at that time it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile." *Campbell*, 279 Or at 243-44.

In 1979, in the aftermath of *Campbell*, commercial hosts in Oregon lobbied the legislature to restrict by statute overservice claims for off-premises injury. *See Chartrand v. Coos Bay Tavern, Inc.*, 298 Or 689, 696-97, 696 P2d 513 (1985) (noting same). The result was ORS 30.950 (1979). *Id.* But, as the Oregon Supreme Court remarked, "the purpose of the bill [in 1979] changed from

restricting liability to expanding liability to third persons," even if it did not include "the person served." *Id*. at 697. *See also Gattman*, 306 Or at 23 ("* * * ORS 30.950 was proposed as a limitation on a tavern keeper's liability, [but] it ended up * * * as a legislative codification of this court's decision in *Campbell v. Carpenter*[.]").

Over several legislative sessions in the following decades, the legislature redrew the contours of a statutory claim for overservice. *See* Or Laws 1987, ch 774, § 13 (adding heightened burden of proof); Or Laws 1997, ch 249, § 19 (grammatical changes); Or Laws 1997, ch 841, § 1 (adding claim notice provisions). Most recently, in 2001, the legislature made three substantive changes. First, the legislature prohibited the served person from recovering from the host or purveyor of alcohol for overservice if that person voluntarily consumes alcohol and then suffers harm "caused by intoxication." Or Laws 2001, ch 534, § 1(1). Second, the legislature eliminated the previous liability for "damages incurred * * * by intoxicated patrons or guests." Or Laws 2001, ch 534, § 1(2). Third, the legislature expanded the statutory overservice cause of action for third-parties who suffered "damages caused by intoxicated patrons or guests." *Id*. As to this final change, consistent with *Campbell*, the statute had since its inception rendered *off-premises* harms "caused by intoxicated patrons or guests" the legally foreseeable consequence of overservice. But in 2001, the legislature eliminated the

reference to "off-premises," making a host liable for harms "caused by intoxication" both on- and off-premises. Or Laws 2001, ch 534, § 1(2).

Before the trial court, Croslin argued that, when the legislature eliminated the distinction between on- or off-premises harm for purposes of an overservice claim, it granted Croslin and other "social hosts" who provided some (but not too much) alcohol immunity against premises liability claims. For this argument, Croslin fixed *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988), as his linchpin. In *Hawkins*, a dispute started in a tavern, and carried on later, off premises. The plaintiff sued the tavern for that later, off-premises assault. The court noted that no contact occurred in the tavern, *id*. at 265 n 2, and there was no allegation that the defendant knew or should have known that its patrons were acting up, *id*. at 269. The court concluded that "[w]ithout 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." *Id*. at 269. In this regard, the opinion is unremarkable.

To Croslin, however, *Hawkins* erected a barrier to plaintiff's recovery, making overservice the *sine qua non* of a tortfeasor's fault for harm involving an intoxicated person. When *Hawkins* was decided, ORS 30.950 provided:

> 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 had served or provided the patron alcoholic beverages when such patron was visibly intoxicated.

Hawkins, 307 Or at 266 (quoting same). And the *Hawkins* Court stated "that in common law negligence actions governed by ORS 30.950, serving alcohol to someone who is visibly intoxicated is the only conduct for which tavern owners may be held liable for off-premises injuries." *Id.* at 268.[4] From this and the 2001 amendment to Oregon's overservice statute that eliminated the statutory distinction between on- and off-premises harms, Croslin reasoned that ORS 471.565 preempts *any* common law tort against a social host (save statutory overservice) where alcohol played *any role* (no matter how small) in the resulting harm.

For three reasons, Croslin reaches too far: (1) *Hawkins* and ORS 30.950 (1979) addressed exclusively negligent overservice that created a foreseeable risk of off-premises harms; (2) Oregon's overservice statute does not preempt unmentioned claims; and (3) the 2001 amendments to Oregon's overservice statute and associated legislative history urge the conclusion that ORS 30.950 does not preempt premises liability claims.

First, *Hawkins* and ORS 30.950 addressed exclusively overservice that created a foreseeable risk of off-premises harms. In construing ORS 30.950, the

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[4] While nominally a holding, the case's ultimate disposition turned on plaintiff's failure to allege the restaurant should have foreseen the harm. *Hawkins*, 307 Or at 269.

court claimed that, at common law, "anyone who served alcohol ordinarily was not liable for injuries resulting from the drinker's intoxication." *Id*. at 266. From this premise, the court traced the development of overservice claims and related foreseeability issues. *Id*. (discussing *Wiener*, 258 Or at 632, and *Campbell*, 279 Or 237). The court then concluded that ORS 30.950 "codified the holding of *Campbell*." *Id*. at 268. *See also Campbell*, 279 Or at 240 (quoting *Rappaport v. Nichols*, 31 NJ 188, 156 A2d 1 (1959), for the proposition that "[w]here a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated * * *, he ought to * * * foresee the unreasonable risk of harm to others through action of the intoxicated person" (emphasis omitted)).

But codified or not, *Campbell* did not hold that overservice was the sole common law theory under which a victim could recover from an establishment for harms that resulted in part from an intoxicated person and in part from other unreasonable conduct that gave rise to a foreseeable risk of harm. *See, e.g.*, *Peck*, 154 Or at 130-31 (upholding patron's verdict based in part on claim that the restaurant—which regularly provided a "special officer" "for the protection of [its] customers"—had failed to provide "an employee * * * to maintain proper order and to exercise reasonable care for the safety, comfort and entertainment of the guests"). And while, under *Hawkins*, ORS 30.950 may "govern" *Campbell*-style common law claims where overservice creates a foreseeable risk of off-premises

injuries, nothing in *Hawkins*' recitation of the legislative history suggests the legislature intended to abrogate other common law claims, especially on-premises claims. *See State v. Ainsworth*, 346 Or 524, 534, 213 P3d 1225 (2009) ("We would expect that, if the legislature had intended to change the well-settled and long-standing law on [a certain] point, the legislative history of [the pertinent amendment] likely would suggest as much.").[5]

In sum, under *Hawkins*, ORS 30.950 "govern[ed]" no more than the common law overservice claims the legislature intended to abrogate: claims in which an alcohol purveyor's ability to foresee off-premises harms to third-parties turned on whether that defendant overserved alcohol to another tortfeasor. Such claims are materially different from plaintiff Baker's common law premises liability claims for various gun-related activities. And so, plaintiff retains her common law claims that Croslin unreasonably created a foreseeable risk of harm to his invitees through the activities on his premises about which he knew, which he encouraged, and in which he participated. *See State v. Black*, 193 Or 295, 301, 236

[5] To the extent that *Hawkins* "held" that ORS 30.950—and, by extension, ORS 471.565—"governs" *all actions* where harm in any way results from an intoxicated person, the opinion should receive no deference from the Supreme Court because it is based on a misapprehension of the prior common law. *See Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 425, 9 P3d 710 (2000) (holding that prior case, which misconstrued the scope of common law overservice claim, was not binding because it was based on "an inaccurate statement of that law").

P2d 326 (1951) (rules of common law that have not been modified or abrogated are binding on courts).

Second, Croslin simply is wrong that Oregon's overservice statute somehow preempts all claims that are not expressly authorized simply because the causal chain may include alcohol among its many links. Repeatedly, Oregon's appellate courts have refused to interpret Oregon's overservice statute (in its various iterations) to preempt common law claims unless expressly required by the act. In *Wiener*, 258 Or at 638-39 n 2, the Supreme Court rejected the proposition that the Dram Shop Act contained the exclusive list of people who could maintain a negligence action against a supplier of liquor. In *Pfeifer v. Copperstone Rest. & Lounge, Inc.*, 71 Or App 599, 604-05, 693 P2d 644 (1985), the Court of Appeals held that Oregon's overservice statute, by its silence on the issue of punitive damages, "cannot be said expressly to exclude an award of punitive damages against a tavern owner where that right existed under the common law." In *Fulmer*, 330 Or at 425, plaintiff, who fell on defendant's premises while intoxicated, stated common law negligence claims even though he did "not allege a claim under ORS 30.950." Oregon's overservice statute does not preempt unaddressed claims.

Third, the 2001 amendments to Oregon's overservice statute and associated legislative history indicate that ORS 471.565 does not preempt premises liability

claims. Before the trial court, Croslin, after misinterpreting the scope of the *Hawkins* holding, latched on to the amendment's expansion of the statutory overservice claim to include both off- and on-premises harms, and then concluded that all premises liability claims are preempted when intoxication plays any role in a third-party's injuries. Croslin misinterprets the amendments.

Viewed in isolation, deleting the "off the premises" element from Oregon's overservice statutory claim arguably could reflect the legislature's determination that a social host or purveyor of alcohol should enjoy immunity for all statutory and common law claims other than overservice. Such immunity did not exist at common law. *See, e.g.*, *Peck*, 154 Or at 130-31. While the legislature may have power to abrogate those other claims, Oregon's courts will not impute to the legislature the intent to abrogate common law claims from a legislative history that is silent on the topic. *See Ainsworth*, 346 Or at 534 ("We would expect that, if the legislature had intended to change the well-settled and long-standing law on [a certain] point, the legislative history of [the pertinent amendment] likely would suggest as much."). The legislature never discussed whether, by deleting the "off the premises" element from Oregon's overservice statutory claim, it would grant purveyors of alcohol and social hosts immunity from all claims other than statutory overservice.

Further, in amending Oregon's statutory overservice statute in 2001, the legislature clarified that—to borrow the verb from *Hawkins*—the statute "governs" only those claims that arise from the overservice of alcohol. It did so by defining what it means for damages to be "caused by" intoxication. In 2001, the Oregon legislature added a prohibition on overserved people seeking recovery for their own alcohol-related harms:

> 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*.

Or Laws 2001, ch 534, § 1(1) (presently enrolled at ORS 471.565(1)).

The legislature used the phrase "caused by" in reference to the effects of alcohol and made clear that, when it addressed "damages caused by intoxication," it did not intend to govern actions other than those for "service of alcoholic beverages to a visibly intoxicated patron or guest." *Id*. And what is explicit in subsection (1) is implicit in subsection (2) where the legislature had previously utilized similar phrasing to describe those claims governed by Oregon's

overservice statute: claims for "damages caused by intoxicated patrons or guests." *See State v. Harris*, 174 Or App 105, 111, 25 P3d 404 (2001) ("there is a presumption that the legislature uses the same term to mean the same thing in similar contexts"). Oregon's overservice statute leaves intact "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." Or Laws 2001, ch 534, § 1.

The legislative history supports that interpretation. *Cf. Morgan v. Amex Assurance Co.*, 352 Or 363, 373-76, 352 P3d 363 (2012) (looking to legislative history to illuminate purpose underlying statutory amendment). In 2001, the legislature's primary goal in prohibiting intoxicated people from recovering for harm "caused by [their] intoxication" was to overrule one part of the Supreme Court's then-recent decision in *Fulmer*, 330 Or 413, which recognized a common-law negligence claim for overservice against a tavern-keeper in favor of an intoxicated patron who injured himself.[6] *See* Audio Recording, Senate Judiciary Committee, SB 925, Mar 13, 2001, at 0:01:12 (statement of Bill Perry, Oregon Restaurant Association), http://www.leg.state.or.us/listn (accessed Nov 27, 2012)

[6] As noted above—and as explained in greater detail below—*Fulmer* also recognized that plaintiffs may have other negligence claims, separate from overservice, against purveyors of alcohol, and the 2001 amendment did not disturb that portion of the *Fulmer* decision.

(discussing *Fulmer* decision). As Bill Perry of the Oregon Restaurant Association explained, "[w]hat we're trying to do here is close a very specific hole that if you participate in your own intoxication, you cannot bring a suit against a server." Audio Recording, House Judiciary Committee, Subcommittee on Civil Law, SB 925, May 14, 2001, at 0:27:15, http://www.leg.state.or.us/listn (accessed Nov 27, 2012).

And when it came time to describe the shape of that "hole," the legislature made clear that its description, damages "caused by [a person's] intoxication," applied to overservice, but not other causes of action. Or Laws 2001, ch 534, § 1(1). The bill's sponsor explained that the savings clause about claims other than overservice was added to address a concern that, without it, the statute could be construed to eliminate other negligence claims, such as premises liability claims. *See* Audio Recording, Senate Judiciary Committee, SB 925, Mar 13, 2001, at 0:02:10, (statement of Bill Perry), http://www.leg.state.or.us/listn (accessed Nov 27, 2012). "[T]hat [effect] was never [the sponsor's] intent under the bill," and that savings clause was added for clarity. *Id.* Representative Lane Shetterly illustrated the limits on overservice actions when, before the House Judiciary Committee, he explaining that if "someone who is visibly intoxicated leaves a premises and in going out of the premises falls through a defective stair and injures themselves, then premises liability will still kick-in separate from damages as a

result of intoxication, so [the amendment is] fairly narrow * * *." Audio Recording, House Judiciary Committee, SB 925, May 23, 2001, at 1:23:15 (statement of Rep. Lane Shetterly), http://www.leg.state.or.us/listn (accessed Nov 27, 2012).

Croslin argues that he is immune from liability because he served Smith some alcohol. Nothing in the legislative history, the phrasing of the statute, nor *Hawkins* itself compels this Court to reach that unjust result.

III. CONCLUSION

This Court should affirm the ruling by the Court of Appeals, overturning the trial court's grant of summary judgment. Plaintiff has proved that Croslin provided alcohol to Smith when he was visibly intoxicated, and plaintiff has proved premises liability separate from Croslin's overservice liability. The statute is triggered by Croslin's control of the supply of alcohol, a question for the jury, and the statute does not erase other common law premises liability.

DATED: January 16, 2015.

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I hereby certify that I electronically filed **RESPONDENT JENNIFER J. BAKER'S BRIEF ON THE MERITS ON REVIEW** with the Oregon Supreme Court Administrator, Appellate Records Section, by using the appellate Electronic Filing System on January 16, 2015.

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