

IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

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

and

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

Multnomah County Circuit Court
1012-16919
Court of Appeals
A150341

S062455

PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS

Petition for Review of the Decision of the Court of Appeals
from a Judgment of the Circuit Court of Multnomah County,
Honorable Karin J. Immergut, Circuit Judge of Multnomah County

Decision Filed: June 11, 2014

Judges: Nakamoto, P.J., Egan, J.,
and Lagesan, J., *Vice* Armstrong, P.J.

Opinion by: Lagesan, J.

Concurring: Nakamoto, P.J.

Dissenting: Egan, J.

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PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS

I. Legal questions presented; proposed rules

First legal question presented

Did the Court of Appeals correctly decide that plaintiffs did not present evidence sufficient to create a factual dispute as to whether Mayfield's act of shooting plaintiffs was a foreseeable result of defendant Gresham Eagles' act of serving alcohol to Mayfield at a time when he was visibly intoxicated?

First proposed rule of law

Where plaintiffs' evidence, viewed in the manner most favorable to them as the adverse parties, along with all reasonable inferences drawn therefrom, establishes that there is a generally known link between excessive alcohol consumption and violence, is sufficient to create a genuine issue of material fact as to the issue of foreseeability.

Second legal question presented

Did the Court of Appeals correctly decide that plaintiffs did not present evidence from which it could reasonably be inferred that defendant Gresham Eagles had reason to know, should have known, or was on notice, that serving Mayfield while he was visibly intoxicated, created the foreseeable and unreasonable risk that he would become violent in his intoxicated state?

Second proposed rule of law

Tavern owners should be held to the same standard, *i.e.*, no service of alcohol is permitted to visibly intoxicated persons, when that over-service leads to acts of violence, as when it leads to dangerous driving. Evidence that a person was visibly intoxicated at the time additional alcoholic beverages were served to that person should be sufficient to create a jury question as to whether any subsequent violent conduct by the visibly intoxicated person was foreseeable.

II. Nature of the action; relief sought; nature of the judgment rendered by trial court

This case involves a common law negligence claim against a server of alcohol for harm caused off-premises to third parties resulting from the service of alcohol to a visibly intoxicated person. On January 29, 2010, Defendant-Respondent on Review, Fraternal Order of Eagles Gresham Aerie #2151 Gresham, Oregon dba Eagles Lodge #2151 Gresham (“GRESHAM EAGLES”), through its employees, served alcohol to defendant Carroll Mayfield (“MAYFIELD”) at a time when he was visibly intoxicated. After leaving Gresham Eagles in an intoxicated condition, Mayfield proceeded down the street on foot, attempted to obtain more alcohol but was denied service at another bar, then walked further down the street to defendant Gresham Players Club

(“PLAYERS CLUB”), where he fired a gun through the open door at plaintiffs, causing life-threatening injuries to each of them.

The trial court granted Gresham Eagles’ Motion for Summary Judgment. The Court of Appeals affirmed. *Chapman v. Mayfield*, 263 Or App 528, 329 P3d 12 (2014) (Egan, J., dissenting).

III. Summary of Argument

Careful consideration of all the evidence in this case and the inferences that may be properly drawn therefrom, leads to the conclusion that plaintiffs’ evidence is sufficient to withstand summary judgment. Where plaintiffs presented evidence that intoxicated drinkers frequently become violent, that the link between visible intoxication and increased levels of violence has been well-understood and publicized for ages, and that professional bartenders are aware of an alcohol-violence connection, a reasonable juror could find that Mayfield’s shooting of plaintiffs was a foreseeable result of Gresham Eagles’ continued service of alcohol to Mayfield at a time when he was visibly intoxicated. Because plaintiffs’ evidence creates a genuine issue of material fact, the courts below erred when granting and affirming Gresham Eagles’ Motion for Summary Judgment.

Notwithstanding the fact that plaintiffs believe the record below establishes a question of fact as to foreseeability in the ways required by *Moore v. Willis*, 307 Or 254, 259, 767 P2d 62 (1988), plaintiffs contend that evidence

that a person was visibly intoxicated at the time alcoholic beverages were served to that person, in and of itself, should be sufficient to create a jury question as to whether any subsequent violent conduct by the visibly intoxicated person was foreseeable. The modern reality of societal and institutional awareness as to the correlation between the overconsumption of alcohol and violent behavior warrants a reexamination of the holding in *Moore, supra*, which ought to be updated accordingly.

IV. Material Facts

The facts of this case were well and correctly stated by the Court of Appeals in both its majority and dissenting opinions. By way of brief additional summary, at around 7:20 or 7:30 p.m. on the evening of January 29, 2010, Mayfield went to Gresham Eagles with his friend, defendant Grant Baughman, and during the course of two and a half to three hours consumed alcoholic beverages there. After consuming at least two shots of whiskey earlier in his home garage, Mayfield consumed three or four beers and a double shot of Pendleton whiskey at Gresham Eagles.

During the time he was served alcohol at Gresham Eagles, Mayfield had a blood alcohol content of between 0.20% by weight and 0.25% by weight, and would have exhibited visible signs of intoxication including appearing unsteady on his feet, having trouble talking, and exhibiting a lack of normal judgment

and self-control (Declaration of William J. Brady, M.D., plaintiffs' expert pathologist, ER 29-30).

After leaving Gresham Eagles, Mayfield tried to obtain service at another bar about a block away, the Gresham Inn, where bartender Hutzler refused to serve him because of his obvious intoxication. Mayfield left the Gresham Inn, crossed the street to the Gresham Players Club, stood in the doorway and shot his revolver into the card room, hitting both plaintiffs and causing serious injuries. Right after the shooting around 10:40 p.m., Mayfield went to yet another nearby bar, the M&M Lounge, where he was denied service by bartenders and servers Heitzman, Radke, and Rubio, because he was visibly intoxicated and "trashed," and they "couldn't possibly serve him." Police were arriving at the scene of the shooting as Mayfield left the M&M Lounge, where employee Heitzman had to help him open a door which he was struggling with and advised him to "be careful" because of his obviously intoxicated state.

Mr. Mayfield was apprehended after Police Cadet Long observed him staggering out of the M&M Lounge, looking around, and weaving when he walked, in a "zig zag" manner. The Gresham Police administered a breathalyzer test to Mayfield at 1:14 a.m. on January 30, 2010, that indicated a whole blood alcohol level of 0.192%.

V. Argument

A. If a reasonable juror could reasonably interpret facts in favor of the non-moving party, the evidence should be so interpreted and summary judgment should be denied.

Viewing the evidence from the factual record below in the light most favorable to plaintiffs, and drawing reasonable inferences therefrom,¹ creates questions of fact such that the trial court should have denied summary judgment, and the Court of Appeals erred in affirming the trial court's ruling.

In the case of *Moore v. Willis*, *supra*, this court held a tavern owner may be liable for injuries to a third party resulting from the service of alcohol to a visibly intoxicated person if it was foreseeable to the tavern owner that serving the person would create an unreasonable risk of violent conduct. Plaintiffs in the instant case did allege that defendant Gresham Eagles was negligent in serving alcoholic beverages to defendant Mayfield at a time when he was visibly intoxicated (Plaintiffs' Complaint, ¶ 19(a), ER 8). Plaintiffs further alleged that intoxicated drinkers frequently become violent, and that defendant Gresham Eagles, an establishment which was in the business of serving alcohol, had reason to know that Mayfield, like any other visibly intoxicated individual, might become violent, because those who are in the business of serving alcohol

¹ See *Robinson v. Lamb's Wilsonville Thriftway*, 332 Or 453, 455, 31 P3d 421 (2001) (Court of Appeals improperly construed evidence and drew inferences in favor of defendant, the moving party).

know that visibly intoxicated drinkers frequently become violent.

The trial court granted summary judgment to defendant Gresham Eagles on the ground that plaintiffs presented insufficient evidence to create a factual dispute as to whether Mayfield's act of shooting plaintiffs was the foreseeable result of defendant Gresham Eagles' act of serving alcohol to Mayfield while he was visibly intoxicated, and the Court of Appeals affirmed.

The majority opinion in the Court of Appeals acknowledges that evidence exists in the record to support what it refers to as plaintiffs' "reason-to-know" theory, but concludes that the evidence is insufficient to permit a fact finder to make the findings required under *Moore, supra, i.e.*, that defendant Gresham Eagles was on notice that serving a visibly intoxicated person creates an unreasonable risk that the person would become violent.

The Court of Appeals' majority opinion focuses its discussion on three discrete elements of the evidence in the record below: 1) a Declaration made by a medical doctor with expertise in alcohol physiology and effects, which attests to the fact that "intoxicated drinkers frequently become violent," 2) the same expert's opinion that "the link between visible intoxication and increased levels of violence has been well-established in the medical, scientific, and lay literature for decades, if not more than a century," and 3) the testimony of the bartender at the Gresham Inn that refused service to Mayfield that violent events in bars relate to "the alcohol talking" (ER 30).

The Court of Appeals majority dismisses this evidence as insufficient to create a question of fact as to defendant Gresham Eagles' awareness of the alcohol-violence correlation relied upon by plaintiffs. What the majority opinion fails to acknowledge is that this evidence reflects the well-established societal understanding of the correlation between intoxication and violence which serves as the basis for those opinions. The fact that visible intoxication and increased levels of violence go hand in hand, is such a longstanding truism that to conclude otherwise is failing to draw a reasonable inference in favor of plaintiffs, the non-moving parties.

The majority opinion implies that Gresham Eagles and its bartenders might not know what a doctor knows, *i.e.*, that intoxicated drinkers frequently become violent, may not read or have read the "unspecified" lay literature to which plaintiffs' expert refers, or even have the simple, real-world, common-knowledge understanding of the obvious connection between alcohol and violence that a more observant bartender down the block has. The net result of this is to draw an inference in favor of defendant Gresham Eagles, the moving party. Moreover, it is placing the stamp of approval on the potentially dangerous behavior of keeping one's head in the sand when public safety is at risk. The conclusion of the trial court and the Court of Appeals that the evidence submitted was insufficient to meet plaintiffs' burden was incorrect.

Under *Moore, supra*, plaintiffs can establish a question of fact on the issue of foreseeability by pleading allegations and presenting evidence in support thereof, showing that a tavern owner's general observations and experiences "in the business of serving alcohol" gave the tavern owner reason to know that violence would be a foreseeable result of serving alcohol to a visibly intoxicated person, and plaintiffs did so below. 307 Or at 260-61. Plaintiffs' evidence below establishes that the link between alcohol and violence is generally known.

Whether it can be inferred that Gresham Eagles, whose business it is to profit from the sale of alcoholic beverages, would be aware of, or be on notice of, the fact that serving Mayfield, or anyone, while visibly intoxicated, creates an unreasonable risk of harm that he will become violent, is well within the realm of reasonable and permissible inferences that the factfinder could draw. Yet, the Court of Appeals finds that this conclusion "is not a rational inference because it does not follow, as a matter of logical probability, from the facts that the summary judgment record establishes." 263 Or App at 535. The logical leap that the majority maintains requires the factfinder to make "too many intermediate inferences and assumptions," *id.*, quite simply doesn't exist.

Plaintiffs' evidentiary facts, as described by the majority at 263 Or App 533-34, establish that 1) intoxicated drinkers frequently become violent, 2) the link between visible intoxication and increased levels of violence has been well-

understood and publicized for ages, and 3) professional bartenders are aware of an alcohol-violence connection.

It doesn't require guesswork to get there logically, and the Court of Appeals' discussion of the permissible stacking of inferences misses the mark. The proffered facts provide information regarding over-service of alcohol and violence that is well-established, knowable and reasonably known to all, especially those who make it their business and livelihood to sell alcohol. A drinking establishment should not be allowed to avoid liability for acts which have collectively been deemed against the public interest by feigning ignorance of what is fundamentally common knowledge.

Plaintiffs agree with the dissenting opinion's characterization of the majority opinion's analysis of plaintiffs' evidence as "miss[ing] the forest for the trees." 263 Or App at 547. The reductive approach taken by the majority focuses on discrete bits, isolated both from societal realities and the greater body of evidence that plaintiffs presented below, which was sufficient to create a genuine issue of material fact.

When the majority writes that the uncontroverted evidence in this case shows that Gresham Eagles did not previously have the opportunity to observe the connection between alcohol and violence, they have sanctioned a type of immunity for tavern owners to escape liability for injuries to others stemming from alcohol-related violence in the wake of negligent over-service. This

approach does not make sense in a society like ours where alcohol-fueled violence is all too common and often has destructive consequences.

B. The holding in *Moore v. Willis* needs to be re-examined in light of the changed landscape of awareness relating to the correlation between alcohol consumption and violence.

It is no secret to any of us that intoxicated drinkers regularly become violent. That was known at the time the Supreme Court decided *Moore v. Willis*, *supra*, in 1998 and it is even better known today, as news of alcohol-driven violence is practically quotidian. *See Moore*, 307 Or at 260 (it may be common for intoxicated and underage drinkers to become violent). Because prudent public policy demands it, because of changes to the legislative landscape concerning alcohol awareness and accountability education, and for the reasons discussed in Judge Egan's dissenting opinion in the Court of Appeals, it is time that this court revisit its formulation of foreseeability as set out in *Moore, id.*; *Chapman, supra*, 263 Or App at 538-553. The fact that someone is visibly intoxicated, standing alone, should make it foreseeable that serving alcohol to that person creates an unreasonable risk that the person will become violent.

As Judge Egan's dissent points out, the Oregon Liquor Control Commission established its education program in 1987 as *Moore* and *Hawkins* were still working through the courts. As a consequence of this landmark development of Oregon's mandatory alcohol server education program, Judge

Egan noted: “Oregon professional alcohol servers understanding of the risks and effects of the overconsumption of alcohol has by legislative directive evolved significantly.” *Chapman*, 263 Or App at 541. This evolution of insight is broad in scope and not exclusive to particular populations: “In the years since those cases were decided, the expansion of awareness regarding the toxic consequences of the overconsumption of alcohol has been immense.” *Id.* at 541-542. The fiction which the majority of the Court of Appeals would like us all to buy—that individual bartenders are operating within their own unique and peaceful oases (as self-described when confronted with allegations of liability) and cannot be expected to be on notice of the common sense correlation between alcohol and violence—is too divorced from reality as we know it.

The pleading standard with respect to foreseeability set forth in *Moore*, as interpreted by the Court of Appeals below, unfairly burdens plaintiffs hopeful to get their cases in front of a jury. What is clear from the evidence in this case is that all but one of the bars that Mayfield visited on the incident evening knew immediately that this man should not be served. The fact that Gresham Eagles served alcohol to Mayfield at a time when he was visibly intoxicated alone should be enough to create a jury question. The dissent puts it more succinctly than we can: “The Oregon Supreme Court’s conclusion in *Moore* that ‘the fact that someone is visibly intoxicated * * *, standing alone, does not make it foreseeable that serving alcohol to the person creates an unreasonable risk that

the person will become violent,’ 307 Or at 260, cannot be reconciled with the knowledge and current environment relating to alcohol.” *Id.* at 541-542. That which the legislature has long-since recognized, that violence is a predictable harm linked to the overconsumption of alcohol, has in turn edified the population of licensed servers in Oregon. It is time the law come into line with these changes which serve to benefit our society as a whole. *Id.* at 544. We respectfully request that this court bring *Moore* into the light of the more informed and accountable present.

In the seminal Oregon liquor liability case of *Campbell v. Carpenter*, 279 Or 237, 566 P2d 893 (1977), this court examined adopted the holding of the New Jersey Supreme Court in *Rappaport v. Nichols*, 156 A2d 1, 9, 31 NJ 188, 75 ALR 2d 821 (1959), and held:

Under the rule of *Rappaport*, however, which we now adopt for application in such cases, 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 other words, this court supplied the foreseeability element as a matter of law when the patron that is served alcohol while visibly intoxicated then drives a motor vehicle that injures an innocent third party.

The next case to examine is *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988). In *Hawkins*, plaintiff was assaulted by another patron at a tavern, after

both patrons left the tavern. Plaintiff brought claims based upon common law negligence, negligence *per se*, and statutory tort principles.² This court reversed the Court of Appeals and upheld the trial court's grant of judgment on the pleadings with respect to all claims. The basis for the holding on the common law negligence claim was that there were no allegations by plaintiff that the assailant had been served alcohol while he was visibly intoxicated, and in the absence of such allegations, plaintiff's common law negligence claim must fail. *Id.* at 307 Or 268.

Interestingly, this court commented on the statutory claim based on then ORS 30.950 (now ORS 471.565), which was the legislature's statutory enactment of the legal principles adopted in *Campbell v. Carpenter, supra*, and noted in footnote 6 at 307 Or 268:

Nothing in the provisions of [ORS 30.950] limits the common law liability of licensees and permittees based on the manner in which the intoxicated person injured the plaintiff. Furthermore, the legislative history does not indicate an intent to distinguish between the types of risks associated with intoxication.

² Plaintiffs in the case at bar also brought claims against defendant Gresham Eagles based upon negligence *per se* and statutory tort principles. Those claims were stricken by the trial court, and plaintiffs have not assigned error to those rulings. Therefore, only plaintiffs' common law negligence claims are at issue on this appeal.

So what are we left with as the current state of the law on the issue of intoxication and foreseeability? *Campbell v. Carpenter, supra*, supplied that element as a matter of law if the visibly intoxicated patron drove a motor vehicle. The Court of Appeals in this case, *Chapman*, held, as a matter of law based upon the record below, that it was not foreseeable that a visibly intoxicated patron would commit an act of violence when the tavern had no knowledge of the patron's particular propensities towards violence and did not have an institutionalized understanding as to the relationship of alcohol and violence.

Perhaps the answer to these divergent points of view lies somewhere between the two extremes: as contemplated by *Fazzolari v. Portland School District No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987), should the jury decide these types of foreseeability issues except in "extreme" cases?³ Or, perhaps, is it time to move beyond 1988, when *Moore* and *Hawkins* were decided, a year Judge Egan referred to as "the endpoint of Oregon's era of oblivion to the dangers of the overconsumption of alcohol"? 263 Or App at 541.

³ See also *Donaca v. Curry County*, 303 Or 30, 38-39, 734 P2d 1339 (1987), decided the same day as *Fazzolari* ("in an extreme case, a court can decide that no reasonable factfinder could find the risk foreseeable or defendant's conduct to have fallen below acceptable standards.")

CONCLUSION

Summary judgment was improperly granted and affirmed, and this court should remand the case to the trial court for further proceedings against defendant Gresham Eagles.

Respectfully submitted this 4th day of December, 2014.

s/J. Randolph Pickett

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,414 words.

Type size

I 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)(f).

DATED: December 4, 2014.

s/J. Randolph Pickett

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2014, I mailed two true copies of the foregoing PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS to each of the following:

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I further certify that on December 4, 2014, I filed the foregoing PLAINTIFFS-PETITIONERS' BRIEF ON THE MERITS with the Oregon Supreme Court via the Court's eFiling system. Participants in this case who are registered eFilers will also be served via the electronic mail function of the eFiling system.

DATED this 4th day of December, 2014.

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