IN THE SUPREME COURT OF THE STATE OF OREGON

JASON CHAPMAN and RICHARD GILBERTSON,
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,
Respondent on Review,

Multnomah County Circuit Court
No. 1012-16919
Court of Appeals
A150341
S062455

RESPONDENT'S CORRECTED 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.

Mr. J. Randolph Pickett
Oregon State Bar No. 721974
Email: randy@pickettlaw.com
Mr. R. Brendan Dummigan
Oregon State Bar No. 932588
Email: brendan@pickettlaw.com
Ms. Kristen West
Oregon State Bar No. 061380
Email: kristen@pickettlaw.com
Pickett Dummigan, LLP
621 S.W. Morrison Street, Suite 900
Portland, Oregon 97205
Tel: 503-223-7770
Fax: 503-227-2530
Of Attorneys for Petitioners on Review

Mr. Jonathan Henderson
Oregon State Bar No. 063554
Email: jhenderson@davisrothwell.com
Daniel Hasson
Oregon State Bar No. 052773
Email: dhasson@davisrothwell.com
Nicole Rhoades
Oregon State Bar No. 993525
Email: nrhoades@davisrothwell.com
Davis Rothwell Earle &
Xóchihua, P.C.
111 S.W. Fifth Avenue, Suite 2700
Portland, Oregon 97204-3650
Tel: 503-222-4422
Fax: 503-222-4428
Of Attorneys for Respondent on Review

Ms. Lisa T. Hunt
Oregon State Bar No. 023306
Email: lthunt@lthuntlaw.com
Law Office of Lisa T. Hunt, LLC
16869 S.W. 65th Avenue, Suite 424
Lake Oswego, Oregon 97035
Tel: 503.517.0851
Of Attorneys for Oregon Trial Lawyers Association: Amicus Curiae

RESPONDENT'S CORRECTED BRIEF ON THE MERITS

INDEX

Page

INDEX (Cont.)

Page

TABLE OF AUTHORITIES

CASES

Page

CASES (Cont.)

Page

CASES (Cont.)

Page

CASES (Cont.)

Page

STATUTES AND RULES

OTHER AUTHORITY

I. INTRODUCTION

The first question for this Court is whether it should reverse decades of its precedent and hold that in a claim for common law negligence, evidence of service of alcohol to a visibly intoxicated person, without more, establishes that it is reasonably foreseeable that the intoxicated person will shoot strangers in an unprovoked homicidal rampage. If the answer to that question is no, as it should be, then the second question is whether plaintiffs here provided the additional evidence necessary to create a question of material fact on the issue of foreseeability by submitting only the declaration of an expert who offered the society-wide generalization that "intoxicated drinkers frequently become violent."

The answer to both questions is no. Plaintiffs were required to present evidence establishing that defendant knew or should have known of Carroll Mayfield's propensity for violence, either from his history, or from his behavior on the night of the attack, before defendant may be held liable for the injuries caused by his unprovoked, violent shooting rampage. The conclusory statement by plaintiffs' expert cannot be sufficient to provide the needed evidence because it does not establish that mere service to a visibly intoxicated person renders an unprovoked shooting of strangers reasonably foreseeable. The expert did not say which intoxicated drinkers become violent, how often intoxicated

drinkers become violent, and, more importantly, he did not say how often intoxicated drinkers *do not* become violent. All of the other evidence plaintiffs relied on in responding to the motion for summary judgment failed to create a disputed question of fact as well, for the reasons identified by the majority in the Court of Appeals.

There are currently well over 15,000 establishments licensed by the State of Oregon to sell alcohol to the public.[1] But the rule of law proposed by plaintiffs–imposition of strict liability for ordinary negligence claims arising out of the alleged overservice of alcohol–would affect more than these fifteen thousands businesses; it would also affect every member of the public, for social hosts are subject to the same overservice liability standards as taverns. One need not stretch the imagination to see how far such a stringent rule would reach. If a neighbor with no history of violence whatsoever stops by the neighborhood Fourth of July barbeque and takes a beer from the cooler while he is visibly intoxicated and then goes home and commits an act of domestic abuse, the social host neighbor would be strictly liable for the assault. If a person intending to commit a terrorist attack on the public stops into a tavern for a drink to steel his nerves before committing

---

[1] http://www.olcc.state.or.us/pdfs/licenses_by_type.pdf (last checked on January 13, 2015).

the attack, and it is determined later that he was visibly intoxicated when he ordered his last drink, the tavern would be strictly liable for all the harm caused by the attack. These scenarios may at first sound far-fetched, but this is precisely the rule of law plaintiffs request. If strict liability is to be imposed in this highly-regulated area of law, that directive should come from the legislature, not from the courts. But the legislature has gone in the other direction since 1979, first enacting the statute limiting claims against providers of alcohol, and then revising it several times in ways that only further limit alcohol provider liability for injuries caused by intoxicated patrons or guests.

Next, the evidence plaintiffs submitted in response to the motion for summary judgment was simply not enough to create a disputed issue of fact sufficient to defeat summary judgment. Plaintiffs rely primarily on the declaration testimony of their expert, but that evidence was insufficient for the reasons identified by the majority in the Court of Appeals.

And yet, even if plaintiffs' expert had said–which he did not–that more than 50% of all violent episodes involved an attacker who had consumed alcohol past the point of visible intoxication, it still does not follow, as a matter of logic, that service of alcohol to a visibly intoxicated person makes it reasonably foreseeable that the person would shoot two complete strangers.

Jason Chapman and Richard Gilbertson (referred to hereafter as "Plaintiffs," their designation in the courts below) urge this Court to abandon years of its prior precedents and adopt a rule of strict liability. The Court should decline to do so. Plaintiffs simply failed to meet their burden in opposing summary judgment below, and decades of legal precedent should not be changed now merely to accommodate their evidentiary failure.

II. STATEMENT OF THE CASE

A. Questions Presented

(1) Should this Court now depart from years of precedent and hold that evidence of service of alcohol to a visibly intoxicated person, standing alone, is sufficient to establish that a subsequent unprovoked shooting by the intoxicated person was reasonably foreseeable?

(2) Was the evidence submitted by plaintiffs in opposition to defendant's motion for summary judgment sufficient to create a disputed question of fact on the issue of the foreseeability of the intervening unprovoked shooting?

B. Statement of Facts and Proceedings Below

By all accounts, Carroll Mayfield was an ordinary man. Recently retired from nearly 20 years as an equipment operator for the City of Gresham, Oregon, the 67-year old described himself as a homebody. Thomas A. Merrick

Declaration, Exh. 1, pp. 10, 58. He spent his days caring for his wife of over 40 years, who was stricken with Multiple Sclerosis. *Id*. at 9, 12, 72. The two lived in the same Sandy, Oregon home for almost 30 years. *Id*. at 72. They have four grown children. *Id.* at 9, 12.

Mayfield had never been arrested, and had not been in a fight since junior high school, over five decades earlier. *Id*. at 120. His last contact with law enforcement was for a speeding ticket in the 1990s. *Id*. at 86. He had never had any mental health counseling. Daniel S. Hasson Declaration, Exh. A, p. 72. He had never previously been in a violent encounter, either as a perpetrator or as a victim. *Id.* at 74.

Mayfield was a lifelong gun owner. Merrick Dec., Exh. 1 at 12. His father was a gunsmith, and gave him his first gun when he was five years old. *Id*. at 12. He carried a concealed weapon permit since 1992. *Id*. at 15. He considered himself a responsible gun owner, and had never fired a gun at anyone in his life. *Id*. at 12, 75. He did not consider himself violent, aggressive, or prone to violent outbursts. Hasson Dec., Exh. A at 97.

Mayfield never had any problems with alcohol, and considered himself a moderate drinker. *Id*. at 29, 82. When he drinks, he generally gets happy, not angry. Hasson Dec., Exh. A at 100-101.

Friday, January 29, 2010 started like many other days for the retiree: he rose between 5:30 and 6:00 in the morning, and got his usual breakfast at a nearby McDonald's restaurant. Merrick Dec. Exh. 1 at 17, 102. He took his wife to a matinee showing of a movie, and spent much of the rest of the day doing chores around the house. *Id*. at 17.

Mayfield's former co-worker, Grant Baughman, called and asked Mayfield if he would like to accompany him to the Eagles Lodge in Gresham that night. Baughman planned to meet his mother and other friends at the Eagles Lodge. Merrick Dec., Exh. 1 at 20. Mayfield declined the offer at first, but when Baughman pressed, and after Mayfield cleared it with his wife, he agreed to go. *Id*. at 18. He had never been to the Eagles Lodge before. *Id*. at 27.

Getting ready to go, and just as he did before he left the house on almost every occasion, Mayfield put a 5-shot hammerless .357 Magnum revolver with a laser sight into the custom-made pocket holster of his leather vest, designed specifically to conceal the weapon. *Id*. at 26, 76, 94-95. He described carrying his concealed gun as similar to putting "your watch on in the morning," and putting a wallet "in your back right pocket." *Id*. at 94-95. It was his routine, and had been for decades. *Id*. at 94-95.

The two arrived at the Eagles Lodge around 7:00 to 7:30 p.m. *Id*. at

26. Mayfield does not recall how much he had to drink, but testified that he bought himself at least one drink, and that he likely had three or four more drinks, which were all purchased by Baughman or Baughman's friends. Merrick Dec., Exh. 1 at 18, 30, 114.

The bartender and the cocktail server both remembered Mayfield from that night. The bartender, Kathleen Bott, described Mayfield as "very normal; just fine." The cocktail server, Barbara Livermore, recalled Mayfield as "very polite, kind." Merrick Dec., Exhs. 5, 6. Mayfield danced with Baughman's group of friends, including Baughman's mother. Merrick Dec., Exh. 1 at 19.

Mayfield left the Eagles Lodge without Baughman and walked down the street. While walking down the street, he drew his revolver, pointed the laser scope into the Gresham Players Club, a card parlor in downtown Gresham near the Eagles Lodge, said some words that those inside did not hear, and shot several times, hitting plaintiffs. Jacques Levadour Dec., ¶ 3-6. Mayfield walked off, entered another downtown bar where he was denied service, and then continued walking down the street, where the police picked him up.

Mayfield does not remember the shooting. He testified that he woke up at the Gresham police station after the shooting with no memory of what happened. Merrick Dec., Exh. 1 at 18, 42.

Nobody has been able to explain why Mayfield did what he did that night. At his deposition, Mayfield described trying to think of a reason, but could not think of one. *Id*. at 88. At his deposition, Mayfield could not "think of any reason why anyone at the Eagles would know that serving [him] alcohol would lead to a violent outburst." Hasson Dec., Exh. A at 120. He described the incident as "completely off the radar" for him. *Id*.

Mayfield pled no contest to seven counts of attempted murder and two counts of first-degree assault. Merrick Dec., Exh. 6 at 5. Mayfield has never been able to explain the shooting. Mayfield, the prosecutor, the defense attorney, and even the sentencing judge could not explain why the shooting happened. *Id*. at 21, 24-25, 25-26. The police department spokesperson, Sgt. Rick Wilson, said of the incident: "It would appear that this was a random act of violence with no indication Mayfield knew the victims." Merrick Dec., Exh. 8. The Honorable Michael McShane, the sentencing judge and a former public defender, said it was one of the most difficult and unfathomable cases he had ever encountered:

> It's a difficult case. I'll tell you. I've been in criminal justice in various capacities over the last 25 years and most cases fall under fairly predictable kinds of scenarios, and this is just a tough one… He [Mayfield] doesn't fit that pattern of the typical shooting kind of event. He has no prior criminal history at the age of 67. I guess I kind of expected to see some drunk driving charges, maybe some

> domestic abuse kind of charges coming from alcohol issues. Something to indicate that it was a predictable event. But it wasn't.

Merrick Dec., Exh. 6 at 25-26.

Nobody other than Mayfield and Baughman knew Mayfield had a gun concealed in his vest that night. Hasson Dec., Exh. A at 76, 95, 105, 106, 110. Nobody at the Eagles Lodge knew it. *Id*. at 107. At the Lodge, Mayfield was polite and courteous. He did not raise his voice. He did not stagger or slur his words. He never did anything to indicate that he was aggressive or upset. *Id*. at 119-120.

Plaintiffs brought suit against Carroll Mayfield, The Fraternal Order of Eagles Gresham Aerie #2151, the Gresham Players Club, and Grant Baughman. As against Gresham Eagles, plaintiffs alleged claims for negligence, negligence *per se*, and statutory tort. The trial court dismissed the claims for negligence *per se* and statutory tort, and plaintiffs do not challenge that ruling on appeal[2]. *See* Page 14 n 2 of the Petitioners' Brief. Plaintiffs challenge only the summary

---

[2] This Court has previously held that victims of violent crimes at the hands of intoxicated bar patrons are "not within the class of persons intended to be protected by the statute [ORS 30.950] and the harm is not of a type intended to be protected against." *Gattman v. Favro*, 306 Or 11, 23, 757 P2d 402 (1988). It has also held that the statute does not contain an appropriate standard of care for establishing negligence *per se*. *See Hawkins v. Conklin*, 307 Or 262, 265, 767 P2d 66 (1988).

judgment dismissal of their common law negligence claim.

III. SUMMARY OF ARGUMENT

This Court has answered the first question presented in this case before, on more than one occasion. Evidence of service to a visibly intoxicated person, standing alone, is not sufficient to render subsequent intervening violent criminal conduct by the allegedly intoxicated person reasonably foreseeable. There is no reason to depart from this rule now, and plaintiffs offer no compelling reason for the Court to do so.

Next, the evidence submitted by plaintiffs in opposition to the motion for summary judgment fell well short of creating a disputed issue of fact as to the foreseeability of Mr. Mayfield's unprovoked murderous rampage.

IV. ARGUMENT

The trial court did not err when it granted summary judgment to Gresham Eagles, and the Court of Appeals decision affirming the trial court was sound. First, evidence of service of alcohol to a visibly intoxicated person, by itself, is insufficient to render a subsequent unprovoked shooting of strangers committed by the allegedly intoxicated person reasonably foreseeable. Second, an unquantified, societal generalization by an expert that intoxicated drinkers "frequently" become violent is not enough to create a question of fact sufficient to

defeat summary judgment on the issue of reasonable foreseeability. In the only case in the country located by counsel with similar facts–including an almost identical affidavit from an expert in response to a motion for summary judgment–the court affirmed summary judgment in favor of Defendant. This Court should too.

A. Evidence of service of alcohol to a visibly intoxicated person, standing alone, does not make it legally foreseeable that the person will shoot two complete strangers

Gresham Eagles disputes plaintiffs' allegation that it served Mayfield alcohol while he was visibly intoxicated[3]. Plaintiffs did not cross move for summary judgment, and there was no finding by the trial court regarding visible intoxication.

Even if Gresham Eagles served alcohol to Mayfield while he was visibly intoxicated–which it did not–it was not reasonably foreseeable that service of alcohol, by itself, would render Mayfield's unprovoked homicidal rampage

---

[3] The Oregon Trial Lawyers Association (OTLA) states in its amicus brief, and in conclusory fashion, that there is no factual dispute that Mayfield was visibly intoxicated when he was served alcohol at Gresham Eagles. This is false. The unchallenged trial court finding was that there is a factual dispute regarding whether Mayfield was served while visibly intoxicated, and that factual dispute was sufficient to defeat summary judgment on the issue. The amicus brief is a totally unreliable source for facts. *See, e.g.*, Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va L Rev 1757 (2014) (analyzing and criticizing the practice of appellate courts in relying on amicus briefs for facts).

reasonably foreseeable. Gresham Eagles did not know Mayfield was carrying a concealed weapon. It did not know that Mayfield had any violent propensities; indeed, all of the evidence submitted to the trial court established that Mayfield had no violent propensities whatsoever. Mayfield gave no indication whatsoever that he was about to commit a violent act. Nothing in his history would have allowed anyone to conclude that he may become violent, and nothing he did or said while at the Gresham Eagles Lodge allowed anyone to predict that he would shoot two complete strangers. Even with the benefit of hindsight, Mayfield, the prosecutor, criminal defense counsel and the trial judge who sentenced Mayfield could not make sense of what Mayfield did. Likewise, there was no evidence that anyone had ever become violent, let alone homicidal, after being served alcohol at the Gresham Eagles Lodge. There was no competent evidence in the record that could establish that defendant knew or should have known that serving alcohol to Mayfield would result in his unprovoked rampage.

Plaintiffs alleged claims against Gresham Eagles for common law negligence, negligence *per se*, and for statutory tort, but the only claim at issue on appeal is the claim for common law negligence. *See* Page 14 n 2 of Petitioner's Brief on the Merits. As such, the foreseeability standard is as stated in *Fazzolari v. Portland School Dist. No.1J*, 303 Or 1, 17, 734 P2d 1326 (1987):

> [U]unless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from [a] defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.

This standard required plaintiffs to establish that Gresham Eagles was on notice that if it served Mayfield alcohol while he was visibly intoxicated, there was a reasonable likelihood he would become criminally violent. Plaintiffs presented no evidence in opposition to the motion for summary judgment that established that Gresham Eagles knew or should have known that serving alcohol to Mayfield while he was visibly intoxicated created an unreasonable risk that Mayfield would become violent, let alone shoot two strangers. While the trial court found that plaintiffs presented sufficient evidence to create a disputed question of fact as to whether Gresham Eagles served Mayfield while he was visibly intoxicated, that same evidence does not also establish that it was reasonably foreseeable that Mayfield would go on a violent shooting rampage. Reasonable foreseeability is a necessary element of an ordinary negligence claim like the one at issue here. *Or. Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 340-41, 83 P3d 322 (2004) (discussing the reasonable foreseeability element of a negligence claim). A defendant may only be liable for *reasonably* foreseeable

harms, not merely foreseeable harms. *Washa v. Oregon Dep't of Corrections*, 159 Or App 207, 222, 979 P2d 273 (1999), *affirmed at*, 335 Or 403, 69 P3d 1232 (2003) (citing *Buchler v. State*, 316 Or 499, 853 P2d 798 (1993)).

Regarding the reasonable foreseeability element of a common law negligence claim like the one at issue here, this Court has said:

> Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen. Thus fault, as the term is usually understood, is not associated with conduct which causes harm through the concatenation of highly unusual circumstances. If, in our appraisal of the community's conception of fault, we find that the conduct in question clearly falls outside the conception, we are charged with the duty of withdrawing the issue from the jury.

Stewart v. Jefferson Plywood Co., 255 Or 603, 609, 469 P2d 783 (1970).

Here, the community should not deem defendant at fault for Mayfield's violent, unprovoked rampage because *nobody* could have reasonably anticipated that Mayfield would become homicidal. The injuries here were the result of a concatenation of highly unusual circumstances that *Stewart* holds do not support liability under Oregon law.

Plaintiffs argue that evidence that Gresham Eagles served alcohol to Mayfield while he was visibly intoxicated, by itself, should be sufficient to render

Mayfield's subsequent rampage reasonably foreseeable. This Court has rejected this very argument before, and there is no reason for the Court to change course now. Indeed, this Court has repeatedly ruled that in order to hold a defendant liable for injuries to a third party resulting from a criminal assault, on a theory that the defendant provided alcohol to the assailant while he was visibly intoxicated, plaintiffs need to establish that it was foreseeable to the defendant that serving the person would create an unreasonable risk of violent conduct. *Moore v. Willis*, 307 Or 254, 767 P2d 62 (1988); *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988). As noted by the Court of Appeals, this Court said in *Moore* that "[t]he 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. *Moore* and *Hawkins* were consistent with prior case law from this Court. *See, e.g., Reynolds v. Nichols*, 276 Or 597, 601, 556 P2d 102 (1976) ("If the complaint had alleged that defendants served intoxicating liquors to [the assailant] Simmons 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."). Lower courts have followed the rules announced from this Court on the issue. *See, e.g., Sparks v. Warren*, 122 Or App 136, 856 P2d 337 (1993) ("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.").

The rules announced in these cases are also consistent with this Court's other case law regarding foreseeability, both in the context of negligence claims premised on the alleged overservice of alcohol, and in non-alcohol cases involving liability for intervening third party criminal conduct. For instance, in *Chartrand v. Coos Bay Tavern*, 298 Or 689, 695, 696 P2d 513 (1985), this Court held that a plaintiff alleging injuries as a result of an auto accident caused by an intoxicated driver who was allegedly overserved must still plead and prove that the defendant tavern "knew or should have known that the customer would drive a vehicle from the tavern." If evidence of service of alcohol to an intoxicated person, standing alone, is not sufficient to render a subsequent auto accident reasonably foreseeable as a matter of law, then certainly a plaintiff alleging a random and senseless shooting must plead and prove more than simply overservice of alcohol to the assailant to survive summary judgment. Put another way, it is *much* more foreseeable that overservice of alcohol will cause an auto accident than it is an unprovoked shooting rampage on two strangers, and yet, even in the drunk driving case, evidence of reasonable foreseeability is still

required. *Chartrand,* 298 Or at 695.

Requiring evidence of a propensity for violence to establish the foreseeability of an intervening unprovoked shooting is consistent with rulings from this Court in cases involving negligence claims that are not premised on the alleged overservice of alcohol. For instance, in *Buchler v. State*, 316 Or 499, 853 P2d 798 (1993), this Court held that the shooting of two people by a convicted felon who had escaped custody due to the negligence of his State custodians was not the legally foreseeable result of the State's negligence. In *Buchler*, a prisoner who had been convicted of a felony crime escaped from the State's custody while on a work detail because the corrections officer had left the keys in the prisoner van. The escaped prisoner later stole a gun and shot two people, killing one of them. The plaintiffs brought negligence claims against the State of Oregon. The State successfully moved for summary judgment on the grounds that the shooting was not a reasonably foreseeable result of the State's negligence. This Court affirmed the trial court's granting of summary judgment, holding that "[w]hile it is generally foreseeable that criminals may commit crimes and that prisoners may escape and engage in criminal activity while at large, that level of foreseeability does not make the criminal's acts the legal responsibility of everyone who may have contributed in some way to the criminal opportunity." *Id.* at 511. If the

shooting in *Buchler* by an escaped felon was not the legally foreseeable result of the State's negligence, then the unprovoked shooting by a retired homebody with no criminal history whatsoever cannot be the legally foreseeable result of Gresham Eagles' alleged negligence.

As this Court said in *Buchler*, the principle of foreseeability limits the "circumstances or conditions under which one member of society may expect another to pay for a harm suffered." *Id*. at 509. This is an *ad hoc* determination that depends on the circumstances of each case. If the circumstances in *Buchler* served to cut off the State's liability for the intervening criminal conduct of an *escaped felon*, then the circumstances here should cut off Gresham Eagles' liability for an intervening criminal assault by a person with no violent propensities or proclivities whatsoever.

Requiring evidence of knowledge on the part of the tavern of the assailant's violent propensities is equally consistent with the overwhelming weight of persuasive authority from around the country, spanning decades of time, right up to the present. While a nose count of the jurisdictions ruling one way or the other is not particularly instructive, the reasoning in those cases is instructive and persuasive. So too is the fact that so many appellate courts have looked at this issue and decided it in the way defendant advocates. The undersigned counsel has

located no cases from around the country in which any appellate court has adopted the rule of law proposed by plaintiffs. To the contrary, in those courts that have had occasion to decide whether overserving alcohol makes subsequent violent criminal conduct legally foreseeable, the courts have resoundingly decided that overservice, without additional evidence that the tavern knew of the intoxicated person's propensity for violence, is insufficient to establish foreseeability as a matter of law.

One of the leading cases is *Christen v. Lee*, 780 P2d 1307, 1316 (Wash 1989). In *Christen*, the Washington Supreme Court affirmed summary judgment in favor of alcohol providers in consolidated cases arising out of a shooting and stabbing, holding that, "a criminal assault is not a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, unless the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions."

The *Christen C*ourt held that even if the tavern had actual knowledge that the assailant had a knife, the assault was still not foreseeable as a matter of law:

> The assertion has been made, however, that Mr. Coates [the assailant] may have shown a switchblade knife to his friend, the bartender at McDougall's [the tavern], and that this would provide McDougall's with the requisite notice of the possibility of harm. We disagree.
>
> * * *
>
> We thus conclude that any knowledge by McDougall's that Mr. Coates was carrying a knife was insufficient to provide McDougall's with notice of the possibility of harm that ultimately ensued here.
>
> * * *
>
> There being no evidence of any actions on the part of Mr. Coates that would put McDougall's on notice of the possibility of this harm, and the assault having occurred away from the premises, we conclude that his stabbing of Mr. Long along the highway would not be a foreseeable result of furnishing intoxicating liquor to him while he was obviously intoxicated. As a matter of law, therefore, McDougall's is not liable for damages arising out of Mr. Coates' subsequent stabbing of Mr. Long based on its asserted breach of this duty.

Id. at 1316-17.

The *Christen* Court then reached the exact same conclusion in the shooting case, and in so holding, it relied on the foreseeability analysis from the stabbing case. The court explained that even if the tavern had actual knowledge that the assailant had a gun, the shooting was still unforeseeable as a matter of

law:

> As already discussed, the fact that the China Doll [the tavern] may have been aware that Mr. Visitacion [the shooter] possessed a gun does not by itself provide the required notice. Rather, there must have been some conduct on the part of Mr. Visitacion indicating that he might actually use the gun. Based on the record before us, there was no such conduct.

Id. at 1320.

If anything, this case presents an even more compelling case for summary judgment than in *Christen*. Whereas in *Christen*, the tavern had actual knowledge that the assailants were armed with a knife and gun, here there was no evidence whatsoever that anyone at Gresham Eagles knew or should have known that Mayfield was armed with a gun.

The *Christen* holding has been adhered to by Washington courts for decades now. *See, e.g., Logan v. City of Pullman Police Dept., et al.*, 2006 US Dist LEXIS 24868 (ED Wash April 14, 2006) (following *Christen* and dismissing overservice claims against restaurant on the grounds that the injuries were not the legally foreseeable result of overservice); *Cameron v. Murray*, 151 Wn App 646, 214 P3d 150 (2009) (affirming summary judgment in favor of social host, reasoning that under *Christen*, the criminal assault was not the legally foreseeable

result of serving alcohol to an intoxicated guest).

Similarly, in *Sucanick v. Clayton*, 730 P2d 867, 869 (Ariz 1986) the Arizona Supreme Court affirmed summary judgment in favor of a tavern where "neither the tavern owner nor any of his employees had any notice either that [the assailant] posed a threat of physical harm to other patrons or that serious trouble would occur."

In *Jones v. Starnes*, 245 P3d 1009, 1012 (Idaho 2011), the Idaho Supreme Court also recently concluded that a criminal assault by a bar patron was not foreseeable:

> Here, even if [the victim] was a patron and the injury occurred on the premises, the assault was not foreseeable because there is no evidence that [the tavern] had knowledge of the unknown assailant's violent propensities.

The Kentucky Supreme Court's opinion in *Isaacs v. Smith*, 5 SW3d 500 (Ken 1999) is particularly instructive. In *Isaacs*, two groups in a nightclub had a brief shouting match after a member of one group had bumped an ashtray into a member of the other group. The nightclub did not eject either group, nor did it stop serving either group alcohol. Later in the evening, a member of one group shot a member of the other group in the back. The nightclub successfully moved for summary judgment on the basis that "as matter of law, reasonable minds could

not disagree that Nite Life [the tavern], even though serving alcohol to an allegedly already intoxicated Isaacs [the assailant], could not foresee that Isaacs would draw a concealed (then 'illegal') handgun and shoot Smith in the back." On appeal, the Kentucky Supreme Court affirmed the trial court's granting of summary judgment in favor of the nightclub notwithstanding the evidence of the prior shouting altercation. *Id*. at 502-03. In so holding, the *Isaacs* court aptly explained the difference in foreseeability analysis in assault cases and those based merely on drunk driving accidents:

> Despite the increasing violence of our society, the parallel between the foreseeability of impaired driving and the foreseeability of shooting another person is untenable...Although Nite Life erred in serving Issacs once it became apparent that he was intoxicated, the establishment could not have anticipated that Isaacs would inflict injury upon Smith simply because the two had quarreled earlier in the evening. Unquestionably, the situation presented in this case is distinguishable from an establishment serving an intoxicated patron who thereafter operates his motor vehicle and injures a third party.

Id. at 502-03.

Kentucky appellate courts have adhered to the *Isaacs* opinion since it was released. *See, e.g., Shimkowiak v. Yucatan at the Landing*, 2005 Ky App Unpub LEXIS 724 (Ky Ct App, Sept. 16, 2005) (following *Isaacs* and affirming dismissal of overservice claims against restaurant, reasoning that the attack was

not the legally foreseeable result of serving the intoxicated assailant alcohol); *Martin v. Elkins*, 2012 Ky App Unpub LEXIS 1004 (Ky Ct App, Aug 31, 2012) (following *Isaacs* and affirming dismissal of overservice claims against social on the grounds that the provision of alcohol did not make the attack legally foreseeable).

Another remarkably similar shooting case is *Devine v. McLain*, 306 NW2d 827 (Minn 1981). In assessing the legal sufficiency of plaintiff's evidence in response to the bar's foreseeability challenge, the Minnesota Supreme Court began its analysis by noting the general rule that, "[t]he foreseeability of injury required for the imposition of liability on a bar is normally found in the bar's knowledge of the dangerous propensities of the person inflicting the injury." *Id.* at 830. Reasoning that the undisputed evidence showed that the assailant had recently moved into the community and had never been into the tavern prior to the day of the shooting, the court held that "there was no evidence from which the jury could have concluded that the actions of defendant McLain were foreseeable by the bar." *Id.* at 830-31. In so holding, the *Devine* Court rejected the plaintiff's proposed rule of law that would have made defendants strictly liable for any injuries resulting from overservice:

> If liability were imposed on the bar in this case, without requiring that the harm which plaintiff Dale Devine suffered be foreseeable, the result would be the imposition of strict liability. *No other jurisdiction has gone this far*. *See Slawinski v. Mocettini*, 217 Cal.App.2d 192, 31 Cal.Rptr. 613 (1963); *Schwartz v. Cohen*, 204 Misc. 142, 119 N.Y.S.2d 124 (1953); *Popovich v. Pechkurow*, 76 Ohio L. Abs. 200, 145 N.E.2d 550 (Ohio Ct. App. 1956). This case is analogous to *Filas v. Daher*, 300 Minn. 137, 218 N.W.2d 467 (1974), in which we refused to impose liability on a bar because the evidence was insufficient to show that the bar had knowledge of the dangerous propensities of the person causing the harm. Reasonable minds could not differ as to the proper outcome in this case. *See Fisher v. Edberg*, 287 Minn. 105, 110, 176 N.W.2d 897, 900 (1970).

Id. at 831 (emphasis added).

The rule to be distilled from the many cases deciding the same issue this Court is now asked to decide is that evidence of a propensity for violence, either from knowledge of the assailant himself, or from the circumstances, is required before the tavern may be held liable for an intervening third party criminal assault, stabbing or shooting. *See also, Crown Liquors of Broward v. Evenrud*, 436 So2d 927 (Fla App 1983) (holding bar assault not foreseeable as a matter of law where there was "no warning that Santas had violent propensities or of any impending violence by Santas," and where "there was testimony that Santas was a 'nice person' and had never caused any problems").

In *Welch v. Railroad Crossing, Inc*., 488 NE2d 383, 388 (Ind Ct App 1986), the Indiana Court of Appeals held:

> For the proprietor of a tavern to be held liable for a criminal assault under a common law theory of negligence, the proprietor must have been alerted to the likelihood of harm by the prior actions of the assailant, either on the occasion of the injury or on previous occasions.

Indiana appellate courts have followed this holding for decades. *See e.g., Ellis v. Luxbury Hotels, Inc.,* 666 NE 2d 1262 (Ind Ct App 1996) (following *Welch* and affirming the dismissal of claims against hotel); *Fast Eddie's v. Hall*, 688 NE 2d 1270 (Ind Ct App 2000) (following *Welch*, reversing trial court's denial of summary judgment, holding that service of alcohol to intoxicated patron did not make subsequent shooting legally foreseeable).

Counsel for Gresham Eagles has not located a single jurisdiction that supports foreseeability of a criminal assault in the absence of some evidence regarding the assailant's propensity for violence, or evidence that the circumstances made the criminal assault foreseeable. A sampling of additional cases from around the country includes: *Brown v. Van Noy*, 879 SW2d 667 (Mo App 1994) (tavern keeper must know assailant was violent person or that assailant conducted himself in a manner to indicate danger to other patrons); *De Gelorm v. Pelc*, 52 Misc 2d 336, 275 NYS2d 446 (1966) (tavern owner "not expected to

anticipate the unusual, abnormal, or the sudden and unexpected," but could be liable where the assailant was in two prior incidents involving an argument or an assault on the same night with plaintiff's brother and nephew); *Huddleston v Clark*, 349 P2d 888 (Kan 1960) (where tavern owner knew patron for ten years, and where patron had never harmed anyone in the tavern, it was not reasonably foreseeable that he would carry out a threat to return with a gun and assault customers); *Hunter v. Cabe Group, Inc*., 535 SE2d 248 (Ga App 2000) (summary judgment in favor of bar affirmed, reasoning "that assailant may have been loud, rowdy, and intoxicated was not enough to put owner on notice of impending attack on another customer"); *Getson v. Edifice Lounge, Inc*., 453 NE2d 131 (Ill App Ct 3d Dist 1983) (off-premises knife attack not foreseeable despite the fact that assailant was served while wearing a buck-knife and a jacket bearing an "Outlaws" biker gang insignia).

Here, there was no evidence that Mayfield had any violent propensities whatsoever, nor was there evidence presented to the trial court that Mayfield's rampage should have been foreseeable due to his behavior or demeanor at the Gresham Eagles Lodge on the night of the shooting.

This Court should look to the legislative enactments and history of the relevant statutes and their revisions to determine whether imposition of strict

liability is in line with any relevant indicia of public policy in this area from the legislature. If it does so, the only conclusion that it should reach is that the legislature, in setting public policy in Oregon, has never intended providers of alcohol to be held strictly liable for any injuries that may occur as the alleged result of service of alcohol to an intoxicated person, regardless of how remote or unforeseeable those injuries are.

Since the legislature first enacted *former* ORS 30.950[4] in 1979, it has revised the statute in several ways, and all of them serve to limit the circumstances in which a provider of alcohol can be liable for injuries caused by a patron or guest. In 1987, the legislature amended *former* ORS 30.950 to impose a heightened "clear and convincing" standard of proof on claimants. *See* Oregon Laws 1987, Chapter 774, Section 13. That standard is still the law today. ORS 471.565(2). Also in 1987, the legislature removed the condition that the statute only applies to limit "off premises" injures. *See* Oregon Laws 1987, Chapter 774, Section 13.

In 1997, the legislature again amended former ORS 30.950. This time, it imposed a bar on actions against commercial alcohol providers unless the

---

[4] The legislature renumbered ORS 30.950 to ORS 471.565 in 2001. *See* Oregon Laws 2001, Chapter 534, Section 1

claimant gives timely and proper legal notice of claim. *See* Oregon Laws 1997, Chapter 841, Section 1. This notice requirement persists today. ORS 471.565(3).

In 2001, the legislature amended ORS 471.565 once again to expressly preclude persons who voluntarily consume alcohol from bringing claims for injuries caused by their own intoxication. *See* Oregon Laws 2001, Chapter 534, Section 1; ORS 471.565(1). At the same time, the legislature created a "complicity" defense that prohibits claims by plaintiffs who cannot prove, by clear and convincing evidence, that they did not "substantially contribute to the intoxication of the patron or guest," whether by providing or furnishing the alcohol to the patron or guest; encouraging the patron or guest to drink; or facilitating the consumption of alcohol by the patron or guest. Oregon Laws 2001, Chapter 534, Section 1; ORS 471.565(2)(a).

In each of these revisions, the Oregon Legislature narrowed liquor liability, or otherwise narrowed the circumstances in which a provider of alcohol could be liable for overservice. From the statutes and the history of the revisions to those statutes, there is no indication of any public policy or intent to expand liability of alcohol providers, let alone to establish strict liability.

This Court has rejected the arguments plaintiffs now make, and plaintiffs do not give any good reason why the law should change now. Instead,

they contradict themselves by arguing that the connection between alcohol and violence has been known for a very long time, but also that our knowledge of the connection between alcohol and violence has progressed so much in the last 25 years that it warrants discarding decades of legal precedent, from both this Court and dozens of others across the country. This argument makes little sense. If the connection between alcohol and violence has indeed been known for such a long time, then certainly it was known by the *Reynolds* Court, the *Hawkins* Court and the *Moore* Court, as well as the dozens of courts from around the country that have repeatedly decided this same issue unfavorably to plaintiffs here. This Court should affirm the Court of Appeals and the trial court.

B. The evidence plaintiffs submitted in response to the motion for summary judgment was insufficient to create a material question of fact on the issue of reasonable foreseeability

To make up for their evidentiary shortcomings, plaintiffs first argue that evidence of service of alcohol to a visibly intoxicated person, standing alone, should be sufficient to establish that Mayfield's shooting rampage was legally foreseeable. This Court should reject that argument, as it has done before, and as argued above.

Instead, and alternatively, plaintiffs argue that they presented evidence in response to the motion for summary judgment that was sufficient to

create a material question of fact sufficient to defeat summary judgment. Plaintiffs argued that those in the business of selling alcohol know that visibly intoxicated drinkers frequently become violent, but they offered no competent evidence to support that societal generalization. That evidence was summarized by the majority in the Court of Appeals:

> (1) a declaration from Dr. Brady—a medical doctor with expertise in "alcohol physiology and effects"—stating that he could testify to "a degree of reasonable medical certainty" to, among other things, the facts that "[i]ntoxicated drinkers frequently become violent," and "[t]he 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 (2) the deposition testimony of a bartender from a different bar down the street that, when a bar patron becomes violent, "[t]hat's the alcohol talking."

Chapman v. Mayfield, 263 Or 528, 532-33 (2014).

This evidence is insufficient to establish that Mayfield's shooting rampage was legally foreseeable to defendant. It does not establish that defendant was on notice of the risk of the harm. The Court of Appeals again summarized the story that emerged from the summary judgment record, in the light most favorable to plaintiffs:

- Prior to the night in question, defendant had not experienced any incidents of violence involving persons to whom defendant served alcohol.

- Defendant's clientele consists of "low-key, very friendly people."
- Mayfield had not been to defendant prior to the night in question.
- Defendant served Mayfield while he was visibly intoxicated.
- Medical professionals with expertise in alcohol physiology and effects have recognized a link between intoxication and violence, and are aware that "intoxicated drinkers frequently become violent."
- A variety of "medical, scientific, and lay literature" has long reported on "[t]he link between visible intoxication and increased levels of violence."
- A bartender in a different bar down the street from defendant has observed that violence occurs in his bar "once a month max" and that when it does, "[t]hat's the alcohol talking."

Id. at 533-34.

None of this evidence establishes that defendant knew or should have known that serving Mayfield while he was visibly intoxicated created an unreasonable risk that he would become homicidal. The Court of Appeals then analyzed whether those facts gave rise to permissible inferences that could defeat summary judgment, and decided that they did not. *Id*. The Court of Appeals

correctly noted that for the facts in the record to give rise to inferences sufficient to defeat summary judgment, the Court would need to impermissibly stack inferences:

> Specifically, a factfinder would have to infer that (1) persons in the business of serving alcohol generally know what medical doctors who are experts in alcohol physiology and effects know about the connection between intoxication and violence; (2) the unspecified "medical, scientific, and lay literature" documenting the connection between intoxication and violence is the type of literature that would be read by persons in the business of selling alcohol; and (3) the operations and clientele of the bar where the other bartender observed a connection between intoxication and violence were similar enough to the operations and clientele of bars generally, or to the operations and clientele of defendant specifically, that that bartender's experiences and observations can be generalized to defendant and/or other bars.

Id. at 535-36.

First, the unadorned and unquantified conclusion, in the form of a society-wide generalization, that "intoxicated drinkers frequently become violent" cannot be sufficient to establish that service of alcohol to a visibly intoxicated person makes it reasonably foreseeable that the intoxicated person will intentionally shoot strangers for no reason. Not only does it not establish that defendants were aware of this "fact," but by itself, it is insufficient to establish that serving alcohol to any one person makes it reasonably foreseeable that the person

will become violent.

In the only case located by the undersigned in which a court analyzed this very question, that court held that mere societal generalizations by an expert were insufficient to establish legal foreseeability. In *Boggs v. Bottomless Pit Cooking Team, et al.*, 25 SW 3d 818 (Tex App 2000), the Texas Court of Appeals affirmed the dismissal on summary judgment of claims in a remarkably similar case. There, plaintiffs alleged their decedent was killed by a patron of defendant who was overserved alcohol at a barbeque event. Defendant moved for summary judgment, arguing plaintiffs' decedent's injuries were not the legally foreseeable result of overservice of alcohol. In response, plaintiffs offered the affidavit of an expert–a board certified toxicologist and pharmacologist–who opined that the assailant was served while visibly intoxicated, and that "alcohol consumption often leads to violence." *Id*. at 822. The appellate court affirmed the trial court dismissal, and rejected the argument that the expert's affidavit created a question of fact on the issue of foreseeability:

> Without evidence that Bottomless Pit knew or had reason to suspect that Bergeron [the assailant], by his demeanor or his behavior, would commit a crime, appellees properly established they could not have proximately caused Alan's death. Dr. Snodgrass' conclusion that Bergeron was 'obviously intoxicated' and intoxication often leads to violence is insufficient to raise a fact issue as to

> foreseeability by appellees that Bergeron would commit a crime.

Id.

This society-wide generalization, proffered by Plaintiffs' expert here, that intoxicated drinkers frequently or often become violent, is no different than saying that criminals are likely to commit crimes, which this Court has already held was insufficient to avoid summary judgment in *Buchler*. This "level of foreseeability does not make the criminal's acts the legal responsibility of everyone who may have contributed in some way to the criminal opportunity." 316 Or 512. Dr. Brady's dubious conclusion that "intoxicated drinkers frequently become violent" is insufficient to create a disputed question of fact on the issue of foreseeability.

Second, inferring that lay persons such as bartenders have the same knowledge as experienced medical doctors in specialized areas of practice, such as alcohol physiology, is an impermissible inference for the court to make. Plaintiffs do not explain how it is that lay persons should know what highly-educated, experienced medical doctors know. The reason for this is simple: lay persons do not have the knowledge that experts have; that is precisely why experts are called to testify in lawsuits. *Compare* OEC 701 with OEC 702.

Next, regarding the literature that allegedly documents the connection between alcohol and violence, the Court of Appeals correctly pointed out:

> It also is not logical to assume that the mere existence of unidentified literature addressing the connection between alcohol and violence means that that literature is of the ilk that people in the business of selling alcohol ordinarily would read—especially when some of that literature is directed toward the fields of medicine and science, and the rest is unidentified, leaving the factfinder to speculate about what that literature is and who is likely to have read it.

This evidence amounts to nothing more than a statement that "there exists some book out there that says what I want it to say." It cannot be sufficient to create a disputed question of fact on the issue of the foreseeability of Mayfield's unprovoked rampage.

Finally, the testimony of Aaron Hutzler, a bartender from a different bar, in which he testifies, obliquely, that alcohol has made some of his bar's clientele violent in the past, is also not sufficient. The Court of Appeals noted that it is not logical to conclude that:

> [T]he operations and clientele of the bar where the other bartender observed a connection between intoxication and violence were similar enough to the operations and clientele of bars generally, or to the operations and clientele of defendant specifically, that that bartender's experiences and observations can be generalized to defendant and/or other bars.

Chapman v. Mayfield, 263 Or at 535-36.

Not only would this be an impermissible inference, it would contradict the evidence in the record. Indeed, the record establishes that the operations and clientele of the bar where the witness worked were significantly different than Gresham Eagles. Whereas Gresham Eagles Lodge had never experienced a single incident of violence as a result of service of alcohol, and described its clientele as low-key friendly people, Aaron Hutzler painted a very different picture of the establishment where he worked, the Gresham Inn. When describing the clientele in the Gresham Inn, Mr. Hutzler testified: "I have tweakers come in my bar, I got people that come in the bar on dope, on heroin[.] * * * Tweakers are meth heads, methamphetamines. I get – you get the whole spectrum." Deposition transcript of Aaron Hutzler, Exhibit K to the Declaration of J. Randolph Pickett, pp. 14-17, submitted in response to the motion for summary judgment. When asked how often he gets customers who are under the influence of methamphetamine, he answered "every day". *Id.* When asked how often people become violent in the Gresham Inn, he answered "once a month[.]" *Id.* This stands in stark contract to the Gresham Eagles Lodge clientele, where they had never observed anyone become violent after consuming alcohol.

Mr. Hutzler's unique experiences and observations cannot be imputed to defendant (and apparently all other taverns) to establish foreseeability, and plaintiffs do not describe how it is that defendant can be charged with the knowledge of a completely different bar with completely different clientele.

This Court should affirm the Court of Appeals and the trial court.

C. The dissent in the Court of Appeals was wrong

As aptly noted by the majority in the Court of Appeals, the dissent got it wrong. Defendant adopts the reasoning in the majority opinion addressing the dissent's arguments, but offers additional arguments as follows.

To support its conclusion, the dissent relies on evidence that is not in the record, and was never offered by any party. It also relies on arguments that were not made by any party, either to the trial court or to the Court of Appeals. The dissent appears to look for ways to make up for plaintiffs' evidentiary shortcomings. This Court should not overturn the Court of Appeals based on evidence that was never submitted and arguments that were never made.

V. CONCLUSION

Plaintiffs failed in the evidentiary burden in opposing summary judgment, and the law should not be changed now to accommodate their evidentiary shortcoming. There is no compelling reason why this Court should

depart from decades of its own precedent and create the apparently unprecedented rule of strict liability that plaintiffs now request. Imposition of strict liability in this area should be left to the legislature, which for over 30 years has shown a consistent intent to limit, rather than expand, the scope of alcohol provider liability for injuries caused by a patron or guest. This Court should affirm the Court of Appeals and the trial court.

DATED this 23rd day of January, 2015.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, P.C.

s/ Jonathan Henderson

Jonathan Henderson, OSB No. 063554
jhenderson@davisrothwell.com
Nicole M. Rhoades, OSB No. 993525
nrhoades@davisrothwell.com
Daniel S. Hasson, OSB No. 052773
dhasson@davisrothwell.com
Of Attorneys for Respondent on Review
Fraternal Order of Eagles Gresham Aerie #2151Gresham, Oregon dba Eagles Lodge #2151 Gresham

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,755 words.

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

Dated this 23rd day of January, 2014.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, P.C.

/s/Jonathan Henderson

Jonathan Henderson, OSB No. 063554
jhenderson@davisrothwell.com
Nicole M. Rhoades, OSB No. 993525
nrhoades@davisrothwell.com
Daniel S. Hasson, OSB No. 052773
dhasson@davisrothwell.com
Of Attorneys for Respondent on Review
Fraternal Order of Eagles Gresham Aerie #2151 Gresham, Oregon dba Eagles Lodge #2151 Gresham

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Respondent's Corrected Brief on the Merits with the Supreme Court Administrator, Supreme Court Records Section, by using the appellate CM/EFC system on January 23, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I have mailed two copies of the foregoing document by First-Class Mail, postage prepaid, for delivery to the following participants:

Mr. J. Randolph Pickett
Oregon State Bar No. 721974
Email: randy@pickettlaw.com
Mr. R. Brendan Dummigan
Oregon State Bar No. 932588
Email: brendan@pickettlaw.com
Ms. Kristen West
Oregon State Bar No. 061380
Email: kristen@pickettlaw.com
Pickett Dummigan, LLP
621 S.W. Morrison Street, Suite 900
Portland, Oregon 97205
Tel: 503-223-7770
Fax: 503-227-2530
Of Attorneys for Petitioner on Review

Ms. Lisa T. Hunt
Oregon State Bar No. 023306
Email: lthunt@lthuntlaw.com
Law Office of Lisa T. Hunt, LLC
16869 S.W. 65th Avenue, Suite 424
Lake Oswego, Oregon 97035
Tel: 503.517.0851
Of Attorneys for Oregon Trial Lawyers Association: Amicus Curiae

/ / /

DATED this 23rd day of January, 2015.

DAVIS ROTHWELL
EARLE & XÓCHIHUA, P.C.

/s/Jonathan Henderson

Jonathan Henderson, OSB No. 063554
jhenderson@davisrothwell.com
Nicole M. Rhoades, OSB No. 993525
nrhoades@davisrothwell.com
Daniel S. Hasson, OSB No. 052773
dhasson@davisrothwell.com
Of Attorneys for Respondent on Review
Fraternal Order of Eagles Gresham Aerie #2151 Gresham, Oregon, dba Eagles Lodge #2151 Gresham