IN THE SUPREME COURT OF THE STATE OF OREGON

CASEY J. DECKARD,

Plaintiff – Appellant – Respondent on Review,

v.

DIANA L. BUNCH,

Defendant,

SC062948

and

JEFFREY N. KING, as Personal Representative of the Estate of Roland King, Deceased

Defendant – Respondent Petitioner on Review.

AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW

Circuit Court No. 10298
Court of Appeals No. A151792
N004899

Review of the Decision of the Oregon Court of Appeals
on Appeal from the Judgment of the Lincoln County Circuit Court,
by the Honorable Charles P. Littlehales, Judge

Opinion Filed:	November 19, 2014
Author:	DeVore, J.
Concurring:	Hadlock, P.J., and Schuman, S.J.

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Notice Pursuant to ORAP 9.05(3)(a)(v)

If Review is allowed, amicus curiae petitioner intends to file a brief on the merits

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I. INTRODUCTION

A. QUESTION PRESENTED

Does Oregon's Dram Shop Act (ORS 471.565 (2013)) create "statutory liability" against alcohol providers in favor of a single class of persons – plaintiffs injured in automobile accidents or does it instead impose restrictions on already-existing common law negligence claims against alcohol providers for all types of injuries caused by intoxicated patrons? Stated another way, did the Oregon Legislature intend Oregon's Dram Shop Act as a limited liability statute (i.e. a shield) or did the Legislature use "reverse language" to create a new claim for statutory liability (i.e. a sword) while simultaneously limiting / restricting existing common law negligence claims against alcohol providers?

B. PROPOSED RULE

Oregon's Dram Shop Act does not create a new statutory liability cause of action. Consistent with both the plain text of the statute and the legislative intent to increase the availability of insurance for taverns and other commercial alcohol providers in Oregon as well as decrease the cost, ORS 471.565 is a limited immunity statute that places conditions on already existing common law negligence claims against alcohol providers.

C. INTRODUCTORY DISCUSSION

The petition for review addresses a significant question of Oregon law regarding the proper interpretation of Oregon's Dram Shop Act. The issue decided by the Oregon Court of Appeals in *Deckard v. Bunch,* 267 Or App 41, ___ P3d ___ (2014) comes up in every Dram Shop case litigated in Oregon and has the potential to affect every tavern, restaurant and hotel that does business in Oregon (as commercial OLCC licensees) as well as every homeowner who allows his or her guests to have a beer or two while enjoying Sunday afternoon football or a Trailblazer basketball game (as a social host).

Until the Court of Appeals decided *Deckard* in 2014, no Oregon appellate court had ever squarely addressed whether the language of the Dram Shop Act creates "statutory liability" for serving a visibly intoxicated patron who then negligently injures a third party while operating an automobile. Interestingly, the Oregon Supreme Court has previously held that the Dram Shop Act does not create a statutory liability claim in favor of plaintiffs who are assaulted by intoxicated patrons. *Gattman v. Favro*, 306 Or 11, 24, 757 P2d 402 (1988).

Deckard v. Bunch is currently the last word on this issue in the automobile context. Yet *Deckard* fails to explain how statutory language that makes no mention of "assault", "automobiles" or any particular class of

plaintiff can create a statutory liability claim in automobile cases where the Supreme Court has held that the plain statutory language does not create a statutory liability claim in assault cases. Moreover, the Court of Appeals fails to explain how trial courts are to apply the Dram Shop Act to common law negligence claims that will be brought concurrently with the *Deckard*-created statutory liability claim. (*See Deckard* 267 Or App at 53, n. 8). Supreme Court review is necessary to bring the same clarity that exists for assault claims to the automobile context.

II. REASONS FOR REVIEW

A. Significant Issue of Law that Arises Frequently

Dram Shop claims involve one of several typical fact patterns: (1) social host who's guest is later involved in an automobile accident (*Deckard v. Bunch*); (2) social host who's guest is involved in some kind of physical altercation or assault (*Baker v. Croslin*, 264 Or App 196, 330 P3d 698 (2013), *rev. allowed*, 356 Or 400, 339 P3d 440 (2014)); (3) commercial server who's patron is involved in an automobile accident (*Chartrand v. Coos Bay Tavern*, 298 Or 689, 696 P2d 513 (1985)); (4) commercial server who's patron is involved in an assault or physical altercation (*Chapman v. Mayfield*, 263 Or App 528, 329 P3d 12, *rev. allowed*, 356 Or 400 (2014)).

It is notable that the two cases cited above as examples of "assault" scenarios have recently been accepted for review by this Court (*Baker* and *Chapman*). In combination with the last two Supreme Court decisions analyzing the Dram Shop Act on fact patterns involving assault (*Gattman*, 306 Or 11 and *Hawkins v. Conklin*, 307 Or 262, 768 P2d 66 (1988), the court decisions in *Baker* and *Chapman* should make applying ORS 471.565 to "assault" claims relatively clear. *Deckard* presents this court with an opportunity to simultaneously provide the same clarity in the "automobile" context – a category of claims that far outweigh "assault" claims in sheer numbers.

Over the last ten plus years I have specialized in defending Dram Shop claims and have represented in excess of 100 Dram Shop defendants in cases involving all of these scenarios. While a minority of these have involved assault, a significant majority have been in the automobile accident context. In those automobile cases, plaintiff's attorneys without exception have plead claims for statutory liability[1], which in every case I have moved to dismiss. Over the years our firm has filed approximately twenty five (25) motions to

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[1] These claims have been described using a wide variety are captions including "statutory tort", "statutory liability", "Dram Shop Liability" and "statutory negligence", demonstrating that even among the plaintiffs' bar there is widespread confusion about the issue.

dismiss the statutory claim. Trial courts across Oregon have granted them in every case but one and a half.[2] I have attached representative sample of court orders as exhibits to this petition. Appendix A.

I currently have nine (9) active cases which are directly impacted by the *Deckard* decision. In four (4) of those cases, the trial court had already dismissed the plaintiff's statutory liability claim before *Deckard* was released (the other five were either pre-litigation or the motion was begin prepared or had been filed but not yet decided when *Deckard* was released). I mention these statistics only to highlight the importance and frequency of this issue. Of course, I am not the only attorney that represents taverns and restaurants – there are many others. Thus, this issue comes up frequently and is one this court should resolve.

Although the present case involves a social host, the decision also applies to restaurants, taverns, hotel bars, etc. If permitted, a statutory liability claim will remove the requirement that plaintiff prove foreseeability – a critical concept in Oregon negligence law – in order to recover against a tavern, restaurant or hotel. This significantly reduces the plaintiffs' burden in a variety of circumstances – for example, where the tavern patrons have brought a

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[2] In that case the trial court held that one plaintiff had a statutory claim, but the other (passenger) plaintiff did not have a statutory claim and his claim was limited by statute.

designated driver, where the patrons live within walking distance of the tavern or where the patron has rented a room at a hotel with a hotel bar. There is a certain irony to the fact that while *Chartrand's dictum* created this confusion, *Chartrand's* actual holding is that failing to properly instruct the jury on foreseeability constitutes reversible error. 298 Or at 695.

Moreover, the legislative hearings throughout the years state the purpose of the Dram Shop Act is to limit liability. We ask this court to look at the hearings themselves, and based on the hearings, to once and for all decide how the Dram Shop Act should be applied.

B. Argument in Favor of Statutory Liability Based on *Chartrand* Flawed and Inconsistent with Other Oregon Supreme Court Cases

As noted in the petition for review, the argument in favor of ORS 471.565 creating a statutory liability claim is essentially based on *dictum* contained in the 1985 case *Chartrand v. Coos Bay Tavern*. Supreme Court review is necessary for the reasons set out in the petition for review, as well as the following additional considerations that we will address in greater detail if review is granted.

1. Issue Not Fully Briefed to *Chartrand* Court

The *Chartrand dictum* was based on a written question by the Court – it was not an issue that was raised below or fully briefed at trial and on appeal.

Chartrand, 298 Or at 695. This simple fact likely explains the subsequent flaws in the *Chartrand dictum* that are discussed below. *See State v. Kennedy*, 295 Or 260, 266, 666 P2d 1316 (1983) (acknowledging that it is "difficult to decide correctly" legal claims that are raised but not substantially briefed).

2. *Chartrand Dictum* Permitting Negligence *Per Se* Claim Missed Case Directly on Point Holding Negligence *Per Se* Claim Unavailable in Over-service of Alcohol Context

The *Chartrand dictum* suggested on remand that the plaintiff could bring three claims: (1) common law negligence; (2) statutory tort (more commonly referred to today as "statutory liability"); and (3) negligence "proved as a matter of law by violation of Oregon Liquor Control Act Chapter 471 as recognized in *Davis v. Billy's Con-Teena*, 284 Or 351, 587 P2d 75 (1978) [negligence *per se*]". *Chartrand*, 298 Or at 695.

Notably, the *Chartrand* Court failed to identify or discuss the fact that the Oregon Supreme Court had previously held that statutes in Chapter 471 prohibiting the service of alcohol to a visibly intoxicated person did not provide an appropriate standard for a negligence *per se* claim. *Stachniewicz v. Mar-Cam Corporation*, 259 Or 583, 586–87, 488 P2d 436 (1971). *Stachniewicz* remains controlling on this point to this very day. *Hawkins*, 307 Or at 265 (rejecting plaintiff's invitation to overrule *Stachniewicz* on negligence *per se* issue in the over-service context, instead applying doctrine of *stare decisis* to

reject negligence *per se* claim); *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 417–18, 413 P3d 710 (2000) (same).

This major oversight by the *Chartrand* Court illustrates the risk for error inherent in analyzing issues that have not been raised below or fully briefed for argument and is but one of several oversights contained in the *Chartrand dictum*.

3. *Chartrand's* Authority for Negligence *Per Se* Claim Was Inapplicable to *Chartrand's* Claim And Had Already Been Overruled By Legislative Amendment

Chartrand's dictum likely failed to identify *Stachniewicz* because the court instead cited to *Davis v. Billy's Con-Teena*, 284 Or 351, 587 P2d 75 (1978) as authority for the negligence *per se* claim.[3] *Davis* is a 1978 case in which the court permitted a negligence *per se* claim for violating a statute that prohibits the sale of alcohol to a minor but does not reference visible intoxication or require any proof of visible intoxication. 284 Or at 356-57. The statute at issue in that case – ORS 471.130(1) provided that it was unlawful to sell liquor to any person "about whom there is any reasonable doubt of his

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[3] *Chartrand* specifically stated: "In fact, the plaintiff could proceed on three theories: *** (2) negligence proved as a matter of law by violation of Oregon Liquor Control Act Chapter 471, as recognized in *Davis v. Billy's Con-Teena*, 284 Or 351, 587 P2d 75 (1978);" 298 Or at 695.

having reached 21 years of age." Thus, *Davis* is inapplicable to the *Chartrand* situation on its face.

However, the *Chartrand* Court's failure goes deeper than that. The *Chartrand* opinion also failed to recognize that one of the main purposes of the 1979 bill that created the Dram Shop Act was to eliminate negligence as a matter of law as recognized in *Davis v. Billy's Con-Teena.*[4] Section 3 of HB 3152 (which became ORS 30.960) accomplished this purpose – replacing the negligence *per se* rule in *Davis* with a reasonable person standard. *Sager*, 296 Or at 39. "Section 3 was passed without major revision." *Id.*

Thus, at the time *Chartrand* cited *Davis* in 1985, not only did *Davis* fail to support a negligence *per se* claim based on over-service (the proposition it was mistakenly cited for), it no longer even supported a negligence *per se* claim based on providing alcohol to minors after the 1979 amendment to ORS 30.960. *See also Smith v. Harms*, 125 Or App 494, 498, n. 4, 865 P2d 486 (1993)

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[4] *Sager*, 296 Or at 37-38: "Commercial alcoholic beverage servers testified at hearings on HB 3152 that they were concerned about the expansion of their liability from two recent decisions of this court. The cases were *Campbell v. Carpenter,* 279 Or 237, 566 P2d 893 (1977), and *Davis v. Billy's Con-Teena, Inc.,* 284 Or 351, 587 P2d 75 (1978). Commercial alcohol servers testified that the holdings in those two cases had made liability insurance much more difficult and expensive to obtain. Minutes, House Comm. on Judiciary, June 11, 1979, Tape 85, Side 2; Minutes, Senate Comm. on State and Federal Affairs and Rules, June 30, 1979, Tape 9, Side 1."

(discussing how the passage of ORS 30.960 in 1979 limited *Davis* to protect direct alcohol sellers against liability).

In summary, not only did the *Chartrand dictum* cite to the wrong case (*Davis*) as authority for allowing a negligence *per se* claim in the context of serving a visibly intoxicated patron, it also failed to recognize that *Davis* had been overruled by the very legislation (HB 3152) that *Chartrand* purports to have analyzed in order to reach its second flawed conclusion – that the legislature intended to create a statutory tort claim!

4. *Chartrand* Relied on Flawed Legislative Research Contained in a Law Review Article Written by a Law Student

The *Chartrand* Court's source material for its legislative history analysis appears to be largely drawn from a Willamette law review article written by a law student, which the Court quotes at length: Comment, *Review of Oregon Legislation*, 16 Willamette L. Rev. 191, 192-93 (1979). *See Chartrand*, 298 Or at 697. In fact, a close review of *Chartrand* reveals that the court did not cite a single primary legislative source.

The cited article contains numerous false and patently inaccurate statements regarding the legislative history of Oregon's Dram Shop Act – as we will discuss in more detail if review is granted. To preview one of the most egregious examples, footnote 47 states as follows:

> "The class of persons intended to be protected by 1979 Or. Laws, ch. 801, §1 includes third parties injured by visibly intoxicated patrons who were served alcoholic beverages by a commercial host after becoming visibly intoxicated. The personal and property injuries caused by visibly intoxicated patrons are the types of harm that Chapter 801 was intended to prevent. The standard of care set forth in Chapter 801 was intended by the legislature to be applied in civil litigation against a commercial host and is, therefore, an appropriate measure of care in third party actions against a commercial host. Or. House Comm. on the Judiciary, *Tapes of the Hearings on H.B.* 3152, Tape 98, Side 1 (June 28, 1979) (Rep Rutherford commented that Ch. 801 would adopt the present case law on host liability."

Upon review of the notes of the hearing session, as well as the actual audio tapes of the hearing, House Bill (HB) 3152 (1979), Hearing and Minutes, House Comm. on Judiciary, June 28, 1979, Tape 98, side 1, it is clear that there is absolutely no discussion even remotely close to what the author contends. Rather, that hearing concerned *Davis v. Billy's Con-Teena, Inc.*, 284 Or 351, 587 P2d 75 (1978) – a case involving liability for allowing minors to purchase or acquire alcohol – <u>not</u> a discussion of harm caused by visibly intoxicated patrons. To make matters even worse, the author mistook a statement of intent by one representative (Representative Rutherford) that he wanted the bill to make existing case law (*Davis*) statutory – as the intent of the legislature. Comment, *supra*, n. 47. The committee <u>rejected</u> Rep. Rutherford's proposal. Instead of "any reasonable doubt" (arguably higher than even the criminal standard), they used the standard of whether "a reasonable person" would have requested identification from the minor. HB 3152, House Comm. on Judiciary,

June 28, 1979, Tape 98, side 1 (Representative Lombard and Chairman Gardner state that the purpose of the bill was to move away from *Davis v. Billy's Con-Teena, Inc.*).

We have attached copies of the hearing minutes and a transcript of the session testimony. Appendix B.

5. *Chartrand's* Discussion of Legislative History Is Cursory and Inconsistent with Both Prior and Subsequent Oregon Supreme Court Analysis of the Same Legislative History

Similar to *Chartrand's* failure to identify or distinguish *Stachniewicz* when addressing the negligence *per se* claim, the *Chartrand* Court also failed to mention that two years earlier, the Supreme Court had engaged in a detailed analysis of the legislative history of ORS 30.950 (now ORS 471.565). In *Sager v. McClenden*, 296 Or 33, 672 P2d 697 (1983), the Supreme Court engaged in a thorough review of the legislative history of the Dram Shop Act and reached the opposite conclusion from the one reached by the *Chartrand* Court.

The *Sager* Court found that the purpose of the Dram Shop Act was to limit the liability of taverns in order to increase availability and affordability of insurance. *Sager*, 296 Or at 37. The *Sager* Court ultimately found that:

> "ORS 30.950 is written in a form which limits, not creates, liability. It reads: 'no licensee *** is liable *** unless ***.' This language logically limits relief rather than expands it. We agree with the Court of Appeals' dissent in this case that ORS 30.950 only provides the condition under which a commercial alcohol beverage server becomes liable to one who already has a claim. In light of the legislative history, we, too read ORS

> 30.950 as imposing a limitation on liability originally created by judicial decision."

Sager, 296 Or at 39-40 (underlining added).

The Court of Appeals' dissent, adopted by the Oregon Supreme Court, was authored by Presiding Judge Richardson and included an even more scathing criticism of the notion that the legislature intended ORS 30.950 to create any statutory tort:

> "As I interpret the language of ORS 30.950, it only provides the condition under which a commercial alcoholic beverage server becomes liable to one who has a cause of action. In other words, it imposes a limitation on the liability created by judicial decisions. I arrive at this conclusion after a review of the legislative history of ORS 30.950 and the status of common law liability of alcoholic beverage servers at the time it was enacted. * * *
>
> The purpose of the bill, as stated by Representative Frohnmayer, was to retreat somewhat from the implication of certain court decisions regarding liability of beverage servers to third parties.
> * * *
> Although the proponents did not obtain all the limitations they desired, it is evident from even a casual reading of the minutes of the legislative committee hearings that the purpose of the legislation, as adopted, was to limit servers' liability. Throughout the committee hearings the discussion centered on beverage servers' liability to third parties.
> * * *
> **The legislative intent in adopting HB 3152 is evident. It was to limit liability, not to extend liability by creating a new cause of action in derogation of the common law. If the words of ORS 30.950 could be read to suggest a new cause of action, that reading should be rejected as obviously being contrary to legislative intent.**"

Sager, 59 Or App at 162–165 (dissent) (emphasis added).

Three years after *Chartrand* was released the Oregon Supreme Court again reviewed the legislative history of the Dram Shop Act to determine legislative intent in *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988). The *Hawkins* Court noted as follows:

> "Nothing in the provisions of the statute [ORS 30.950, now ORS 471.565] limits the common law liability of licensees and permittees based on the manner in which the in which the intoxicated patron injured the plaintiff. Further, the legislative history does not indicate an intent to distinguish between the types of risk associated with intoxication. The purpose of ORS 30.950 was to protect commercial alcohol servers, not to protect a particular class of plaintiffs, such as those who were injured by intoxicated drivers."
>
> *Hawkins*, 307 Or at 268, FN6, citing *Sager v. McClendon*, 296 Or at 37-39 (underlining added).

The creation of a statutory liability claim requires that the legislature intended to protect a particular class of plaintiffs from a particular harm. *Doyle v. City of Medford*, 356 Or 336, 344, __ P3d __ (2014) ("To prevail on a statutory liability claim, a plaintiff must be within the class of persons that the legislature intended to protect, and the harm must be of the sort that the legislature intended to prevent or remedy."). Both the *Chartrand dictum* and the Court of Appeal's holding in *Deckard* rely on the fundamental proposition that the legislature intended to protect plaintiffs injured in automobile accidents with intoxicated drivers – a proposition that is directly contrary to conclusion

reached by the Supreme Court in *Sager* (1983 – two years before *Chartrand*) and in *Hawkins* (1988 – three years after *Chartrand).*[5]

In light of these contradictory conclusions by different appellate court on the single most critical issue in analyzing whether ORS 471.565 creates statutory liability, review and final determination by the Supreme Court is both appropriate and necessary to resolve this controversy. Moreover, because the issue was not briefed in many of the cases, or the discussion was *dicta*, a final, clear statement is needed by this court.

If review is granted, we will present legislative history from multiple sessions of the legislature demonstrating that the intent and purpose of the text, context and legislative intent was and is to limit liability of alcohol providers – not to expand it.

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[5] Plaintiff's reliance on *Solberg v. Johnson*, 306 Or 484, 760 P2d 867 (1988), merits no weight. The purpose of the Bill was not to eliminate third party claims – but rather to limit them. The Dram Shop Statue does both: it preserves third party claims and provides immunity unless the tavern / social host serves a guest / patron while visibly intoxicated. Upon review of the Legislative minutes cited in *Solberg*, it is apparent that those cites were for the purpose that there are two distinct claims; commercial setting and social host. Neither *Solberg* nor *Gattman* cites to <u>any</u> legislative minutes that the statute was passed to protect a certain group of plaintiffs.

6. *Chartrand's* Suggestion that Oregon's Dram Shop Act Codified *Campbell v. Carpenter* is False

The 1979 bill that became ORS 30.950[6] was proposed by the Oregon Restaurant and Beverage Association to limit their liability to third parties in response to *Campbell v. Carpenter. Sager,* 296 Or at 38-39. Plaintiffs and some appellate decisions have keyed on the fact that the language in the first draft of the bill included a "gross negligence" standard, which was later deleted. A deeper look at the issue reveals that the standard was deleted from the bill at the request of the Oregon Restaurant and Beverage Association. HB 3152, Hearing and Minutes, House Comm. on Judiciary, June 26, 1979 – 1:30 p.m., Tape 96, side 1. The proposal to remove the gross negligence standard was intended to take the state of the law back to the pre-*Campbell* standards – in that case, back to the standard applied by the court in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or 632, 485 P2d 18 (1971). HB 3152, Minutes, June 26, 1979 – 1:30 p.m., page 17 (Dave Dietz of the Restaurants of Oregon explains proposed amendments made by ORBA and ROA). There is no suggestion in the legislative record that this was intended to change the purpose of the statute to anything other than its stated purpose: limiting liability of alcohol providers. So the question for this Court is this: Upon a comprehensive

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[6] HB 3152 §1 (1979).

review of all of the legislative history from 1979 through the present, does the Dram Shop Statute provide for limited immunity for common law negligence claims or does it create a statutory liability claim without any foreseeability requirement?

7. Cases Cited by *Chartrand* In Support of Statutory Liability Have No Similarity to Oregon's Dram Shop Act Language

The *Chartrand* court also erred by relying on non-Oregon authorities that dealt with statutes that were inapposite to a discussion of ORS 471.565. To support its argument that "[n]egligence is irrelevant" in liquor liability claims, the *Chartrand* court referred to a law review article which stated in part:

> The effect of dram shop legislation is to impose a degree of strict liability upon the bar owner. [W. Prosser, The Law of Torts § 81, at 538 (4th ed. 1971).] The common law rule of proximate cause is statutorily altered to focus upon the vendor's sale, rather than the consumer's act of drinking the liquor. [*Healy [sic] v. Cady*, 104 Vt. 463, 466, 161 A. 151, 152 (1932).] Such legislation, therefore, frees the injured party from the requirement of establishing negligence or fault on the part of the tavern owner.
>
> *Chartrand*, 298 Or at 517 n. 5.

Relying on *Healey* for the proposition that "dram shop legislation" creates a statutory tort is wholly inappropriate because Vermont's liquor liability law was completely different from Oregon's statutory structure as set out below.

When *Healey* was decided in 1932, the text of *former* 1917 G.L. § 6579 read:

> A husband, wife, child, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person or in consequence of the intoxication of any person, shall have a right of action in his or her own name, jointly or severally, against a person or persons, who, by selling or furnishing intoxicating liquor, have caused in whole or in part such intoxication. (Emphasis added).

The *Healy* court explained that the above statute "created a remedy for wrong where there was none before..." 104 Vt. 463, 161 A. at 151. Furthermore, the court explained that to recover under the statute, a plaintiff only needed to prove that a defendant tavern provided alcohol, that the alcohol caused the plaintiff or decedent to become intoxicated, and that as a result of that intoxication, the plaintiff or decedent was injured.

Chartrand's interpretation that ORS 471.565 creates statutory liability rests on the foundational premise that "a plaintiff protected by such a statute need not resort to any concepts of negligence." Because the authority for the premise is in part based on inapposite reasoning from foreign case law, the Supreme Court should re-examine the purpose and effect of ORS 471.565 with a clean lens.

8. *Grady v. Cedar Side Inn, Inc.* Never Analyzed Whether the Dram Shop Act Creates Statutory Liability

The *Deckard* decision includes a somewhat misleading discussion of statutory liability in the context of *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000), that bears some discussion.

The *Deckard* decision explained *Grady* as follows: "In reaching its decision in *Grady*, the court deemed *former* ORS 30.950 to create statutory liability and labored to resolve only whether plaintiffs, under the circumstances of the case, fell within the statute's purview." *Deckard*, 267 Or App at 48.

Grady involved an automobile accident in which the plaintiff was riding in the automobile with the intoxicated driver. There was some evidence that plaintiff may have purchased drinks for both himself and the driver at defendant's tavern prior to their accident. Plaintiff brought claims for "statutory liability" and common law negligence against Cedar Side Inn. Before trial, Cedar Side Inn moved for summary judgment on the grounds that:

> "as a matter of law, the evidence was insufficient to support a finding of liability under ORS 30.950 or common law negligence; and (2) plaintiff was a participating party to Elliot's [intoxicated tortfeasor] intoxication or, at the least was not an 'innocent third party' and, therefore, was barred from recovery under any theory." *Id.* at 46.

The trial court granted the defendant's motion on both grounds. *Id.*

Notably, the Cedar Side Inn did not appeal whether plaintiff could state a claim for "statutory liability" under *former* ORS 30.950 or that plaintiff should

not be allowed to move forward with simultaneous claims for "statutory liability" and common law negligence, and therefore this issue was not before the court on appeal. *Id.*

On appeal, the Oregon Supreme Court first held that a plaintiff's complicity in serving alcohol to a visibly intoxicated Elliot did not bar him from recovering against the tavern that served the alcohol. *Id.* at 46-47. The court then turned to the question of whether plaintiff was "otherwise barred, as a matter of law, from recovery on either his statutory or common-law claim for relief." *Id.* at 47. The court addressed the statutory claim alleged under ORS 30.950 and found that "nothing in the text or context of ORS 30.950 suggests that the legislature intended to limit liability under the statute to claims made by 'innocent' third parties." *Id.* at 48. Therefore, the court held that the plaintiff was not barred, as a matter of law, from bringing the claim against defendant Cedar Side Inn. *Id.* at 49. Of note, the defendant did not argue, and the court did not address, whether a statutory claim existed in favor of plaintiff in the first place. Rather, the court merely addressed whether there was sufficient evidence to show that Elliot was served while visibly intoxicated and whether the plaintiff's status as a social host (providing alcohol to Elliot) would bar his recovery as a matter of law.

Given the confusion created by the *Chartrand dictum* and the fact that the defendant never moved to dismiss the statutory liability claim (i.e. never preserved or briefed the issue on appeal), it is not surprising that the Court did not address the issue *sua sponte.* The *Grady* Court thus avoided doing exactly what the *Chartrand* Court did – weighing in on an issue that had not been preserved, fully briefed and argued – instead leaving the matter to future courts, such as this one.

If this court accepts review, it will have the benefit of full briefing and argument – including complete legislative history from 1979 through 2001.

III. CONCLUSION

This Court should grant review to allow a thorough consideration of the text, context and complete legislative history of Oregon's Dram Shop Act (i.e., the actual source materials) before deciding this important issue of Oregon law.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the word limit of 5,000 words for petitions for review pursuant to ORAP 9.05(3)(a), and that the word count of this brief is 4989 words as described by ORAP 5.05(2)(a). I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

/s/ Jeffrey D. Eberhard

Jeffrey D. Eberhard

CERTIFICATE OF SERVICE

I certify that I mailed two copies of the attached **AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW** to the following Attorneys, at the addresses indicated, by first class mail, with postage prepaid, on February 18, 2015:

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DATED this 18th day of February, 2015.

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