IN THE SUPREME COURT OF THE STATE OF OREGON

CASEY J. DECKARD,

Plaintiff – Appellant – Respondent on Review,

v.

DIANA L. BUNCH,

Defendant,

and

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

Defendant – Respondent – Petitioner on Review.

Circuit Court No. 102298
Court of Appeals No. A151792
Supreme Court No. S062948

Appeal from the General Judgment of the Lincoln County Circuit Court, by the Honorable Charles P. Littlehales, Judge

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Defendant King's Brief on the Merits

Date of Decision:	November 19, 2014
Author:	DeVore, J.
Concurring:	Hadlock, P.J., and Schuman, S.J.

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I. INTRODUCTION

This action arises out of an auto accident between plaintiff and Diana Bunch in which plaintiff was seriously injured. He alleged that the accident was caused by Bunch's negligence in driving carelessly and while intoxicated, and by Roland King's negligence in providing alcohol to Bunch beforehand.[1] He also alleged that King committed a "statutory tort" based on ORS 471.565(2), which provides in part that a "social host" is "not liable" for damages caused by an inebriated guest "unless" the host served alcohol to the guest while the guest was "visibly intoxicated." King moved to dismiss the ORS 471.565(2) claim, arguing that the statute does not create a right of recovery but, instead, limits plaintiff's common-law right to recover. The trial court agreed and granted the motion, and the case proceeded to trial on the negligence claims only. The jury found that Bunch was "at fault," but that King was not. Plaintiff appealed from the ensuing judgment, arguing that the trial court erred in dismissing his ORS 471.565-based claim. The Court of Appeals agreed, concluding that, in enacting the statute, "the legislature intended to create statutory liability." *Deckard v. Bunch*, 267 Or App 41, 51, 340 P3d 644 (2014). After rejecting King's backup argument that the alleged error was rendered harmless by the jury instructions, *id.* at 52-54, the court reversed the

[1] King died after the accident, so this action was brought against the personal representative of his estate, Jeffrey King. This brief, like the opinion below, refers to both as "King."

judgment for King and remanded the case for a new trial on the ORS 471.565 claim. *Id.* at 54. King filed a petition for review, which this court allowed.

II. QUESTION PRESENTED

Does ORS 471.565 create a claim for statutory liability, often referred to as a "statutory tort"?[2] More precisely, does it create a right of action against a commercial or social host who serves alcohol to a guest who, in turn, injures a third party?

III. PROPOSED RULE

ORS 471.565 does not create a statutory liability, as the Court of Appeals held. Contrary to that court's opinion, the statute does not create a right of action against a commercial or social host who serves alcohol to a guest who then causes injury to a third party. Just the opposite: the statute *limits* whatever liability the host might have at common law. To be precise, the statute provides that, in

[2] That term – "statutory tort" – appeared in early cases as a means for describing liability imposed by statute. *See, e.g.*, *Chartrand v. Coos Bay Tavern*, 298 Or 689, 696 P2d 513 (1985). But "statutory liability" is now the preferred terminology, because, as this court exlained in later cases, not all liability created by statute can be characterized as a "tort." *See Gattman v. Favro*, 306 Or 11, 23 n 4, 757 P2d 402 (1988); *Hawkins v. Conklin*, 307 Or 262, 265 n 3, 768 P2d 66 (1988); *see also Dunlap v. Dickson*, 307 Or 175, 179 n 3, 765 P2d 203 (1988) ("We prefer to use the term 'statutory liability' in place of the term 'statutory tort.'").

addition to proving the usual elements of a common-law negligence claim, the third party must also prove that the host served alcohol to the guest while the guest was visibly intoxicated. The fact that ORS 471.565 does not impose liability, but instead limits it, is clear from the statute's text and history.

IV. FACTS AND PROCEEDINGS

Plaintiff was injured when his car collided on a highway with one driven by Bunch, who had "crossed over and through the center turn lane." SER 1-2 (¶ 3). In the first claim of his amended complaint, plaintiff alleged that Bunch was negligent in driving carelessly and while intoxicated. SER 2 (¶5). In the second claim, plaintiff alleged that King was negligent in "serving and/or providing" alcoholic beverages to Bunch while Bunch was "on King's premises" and "visibly intoxicated," and that it was "reasonably foreseeable," at that time and place, that Bunch "would drive her car and cause injury to persons on the roadway, including [p]laintiff." SER 4 (¶14). In the third claim, plaintiff alleged that King was "statutorily liable" for "serving and/or providing" alcohol to Bunch "when she was visibly intoxicated in violation of ORS 471.565." SER 5 (¶ 19)

King moved to dismiss the third claim for failure to state ultimate facts sufficient to justify relief. *See* ORCP 21 A(8); ER 24. In support of the motion, King argued that "ORS 471.565 does not create a new statutory cause of action,"

but "[r]ather * * * operates as a 'shield' [by] imposing conditions and limitations on any existing common[-]law claims against * * * alcohol providers." ER 29; *see also* ER 1-3 (transcript of hearing on motion). The trial court agreed and dismissed the claim. ER 2.

The case then went to trial on the first two claims, the ones based on common-law negligence, ending in a verdict which found that Bunch was "at fault," but that King was not, and that plaintiff had suffered some damages. Tr 1801-02. Consistent with those findings, the trial court entered a judgment for plaintiff against Bunch, and for King against plaintiff. ER 46-49.

Plaintiff appealed and assigned error to the dismissal of the statutory-tort claim. In the meantime, Bunch filed a separate appeal, but dismissed it before briefing. She is not a party to this appeal, the one brought by plaintiff.

As noted above, the Court of Appeals held that the trial court erred in dismissing plaintiff's ORS 471.565 claim, because, the court said, the legislature intended, when it enacting that law, "to create statutory liability." *Deckard*, 267 Or App at 51. The court also held that the jury instructions "did not resurrect the statutory claim" and, therefore, did not cure the error. *Id.* at 54. Accordingly, the court reversed the judgment for King and remanded the case for a new trial on the ORS 471.565 claim. *Id.* at 54.

V. ARGUMENT

In the trial court proceedings, plaintiff argued that ORS 471.565 creates what he called a "statutory tort." In other words, he argued that it imposes liability, even without fault, on social hosts who serve alcohol to guests who are visibly intoxicated when served and who then cause injury to a third person. The legislature can, of course, do that – it can create an action for damages. Likewise, and subject to the restraints of the "remedy" clause in Article I, section 10, of the Oregon Constitution, the legislature can impose limits on common-law actions. *See generally Howell v. Boyle*, 353 Or 359, 298 P3d 1 (2013) (discussing remedy clause constraints). Whether the legislature has done either of those things in enacting a particular statute – *i.e.*, created a remedy or limited one – is a matter of statutory interpretation,[3] which the court should decide through the methodology announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), and refined in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). That methodology begins with an examination of the statutory text, taken in context, and proceeds to a review of the legislative history. *See PGE*, 317 Or at 611-12; *Gaines*, 346 Or at 171-72. Applying that methodology here, the court should

[3] *See Bellikka v. Green*, 306 Or 630, 636, 762 P2d 997 (1988) ("A 'statutory tort' allows recovery of damages if the plaintiff can show that the damages suffered came about as a result of the violation of a statute which the legislature passed *intending to give recourse to a group of plaintiffs*.") (citations and internal quotation marks omitted) (emphasis added).

conclude that ORS 471.565 does not create liability, but instead limits whatever liability there might otherwise be. Accordingly, this court should conclude that the trial court did not err in dismissing plaintiff's statutory claim, but that the Court of Appeals erred in reviving it.

A. Text

ORS 471.565 provides in relevant part:

> "(1) A patron or guest who voluntarily consumes alcoholic beverages served by a person licensed by the Oregon Liquor Control Commission, a person holding a permit issued by the commission or a social host *does not have a cause of action*, based on statute or common law, against the person serving the alcoholic beverages, *even though* the alcoholic beverages are served to the patron or guest while the patron or guest is visibly intoxicated. * * *
>
> "(2) A person licensed by the Oregon Liquor Control Commission, person holding a permit issued by the commission or social host *is not liable* for damages caused by intoxicated patrons or guests *unless* the plaintiff proves by clear and convincing evidence that:
>
> "(a) The licensee, permittee or social host served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated; and
>
> "(b) The plaintiff did not substantially contribute to the intoxication of the patron or guest by:
>
> "(A) Providing or furnishing alcoholic beverages to the patron or guest;
>
> "(B) Encouraging the patron or guest to consume or purchase alcoholic beverages or in any other manner; or

> "(C) Facilitating the consumption of alcoholic beverages by the patron or guest in any manner."

(Emphasis added.)

The first thing the court will notice about this language is that it doesn't say when a host is liable for serving alcohol to a guest who then injures himself or others. On that the contrary it says when the host is *not* liable. Subsection (1) says that a guest "does not have a cause of action" against the host for the guest's own injury, "even though" the guest was served while visibly intoxicated. Subsection (2) then says that a host is "not liable" for injury the guest inflicts on a third party "unless" the guest was served while visibly intoxicated. Far from creating liability, these subsections impose restrictions on whatever liability the host might otherwise have *outside of* the statute, including under the common law.

Which is just what this court observed about an earlier version of the same statute. In *Sager v. McClenden*, 296 Or 33, 39, 672 P2d 697 (1983), the court said that "[t]his language" – referring to the *not-liable-unless* construction in what is now ORS 471.565(2) – "logically limits relief rather than expands it."

The language of a statute is the best evidence of the legislature's intent, which is why this court's methodology for construing a statute starts with analysis of the text. As *Gaines* explains, "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give

expression to its wishes." 346 Or at 160 (citations and internal quotation marks omitted). The fact that, in *Sager*'s words, the text of ORS 471.565(2) "logically limits relief rather than expands it" is incompatible with the Court of Appeals's conclusion that the statute was intended to create a new remedy. As noted in *Gattman v. Favro*, 306 Or at 23 n 11, "it is unusual to create a statutory tort with language that 'no person is liable unless.'"

There are, of course, many ways for the legislature to create statutory liability, when that is what it intends. *See, e.g.*, ORS 30.780 ("Any person violating [the anti-gambling statutes] *shall be liable in a civil suit* for all damages occasioned thereby."); ORS 30.825 ("Any person who is damages by an act prohibited by ORS 164.886(1) to (3) [tree spiking] *may bring a civil action* to recover damages sustained."); ORS 30.920(1) ("One who sells or leases any product in a defective condition unreasonably dangerous to the user or consumer * * * *is subject to liability* for physical harm or damage to property caused by that condition[.]"); ORS 90.365(2) ("[T]enant *may recover damages* * * * for any noncompliance by the landlord with the rental agreement" or requirement in ORS 90.320 to maintain premises in habitable condition); ORS 659A.885(1) ("Any person claiming to be aggrieved by [unlawful discrimination in employment or housing] *may file a civil action in circuit court*.") (emphasis added). ORS 471.565 does not follow any of these examples.

In sum, the text of ORS 471.565 does not support plaintiff's contention – or the Court of Appeals's conclusion – that it creates a remedy. Just the opposite – the text refutes that contention.[4]

B. History

ORS 471.565 is a combination of two statutes that were enacted in 1979 in response to three decisions by this court involving claims for negligence in serving alcohol to someone who then injures himself or others. As explained below, the 1979 statutes were enacted at the behest of the restaurant and beverage industries in order to limit liability under those decisions. And the subsequent amendments of the statutes, culminating in ORS 471.565, did not alter their effect, although *dicta* in two cases suggest otherwise.

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[4] ORS 471.565 does not impose a duty on hosts *not* to serve visibly intoxicated guests. That duty is imposed by another statute, ORS 471.410(1), which reads: "A person may not sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated." Accordingly, this case is not of the type discussed in *Doyle v. City of Medford*, 356 Or 336, 337 P3d 797 (2014), where the court is asked to recognize a private right of action to enforce a duty created by a statute that does not itself create such a right. In any event, this court has already held that the duty in ORS 471.410(1) – the duty not to serve someone who is visibly intoxicated – does not create an appropriate standard of care for imposition of liability as a matter of law. *See Stachniewicz v. Mar–Cam Corporation*, 259 Or 583, 586-87, 488 P2d 436 (1971), *overruled in part on other grounds by Davis v. Billy's Con–Teena, Inc.*, 284 Or 351, 356 n 4, 587 P2d 75 (1978); *Hawkins*, 307 Or at 265. That fact, and the fact that there already is a common-law remedy for the same misconduct, namely, a negligence claim, forecloses a judicially-created remedy under the *Doyle* factors.

1. The Pre-1979 Cases

The plaintiff in *Wiener v. Gamma Phi, ATO Frat.*, 258 Or 632, 639, 485 P2d 18 (1971), was a passenger in a car that that went off the road and struck a building, injuring her. At the time, she and the underage driver were on the way home from an off-site fraternity party where he had consumed a large amount of beer or other alcoholic beverages. The plaintiff sued, among others, the fraternity member who purchased the beverages served at the party, claiming he was liable for common-law negligence. 258 Or at 636-38. On appeal from a judgment dismissing that claim, this court observed that, "[o]rdinarily, a host who makes available intoxicating liquors to an adult guest is not liable for injuries to third persons resulting from the guest's intoxication." (Footnote omitted.) But, testing the plank, the court also said "[t]here might be circumstances in which the host might have a duty to deny his guest further access to alcohol," as "where the host has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things." *Id.* (footnote and internal quotation marks omitted). "Such persons," the court said, "could include those already severely intoxicated[.]" *Id.* But, the court said, the fraternity member who bought the beer served at the party could not be held liable for the plaintiff's injuries, because he did not actually serve it – he was merely a "conduit" to those who did. *Id.* at 640.

What *Wiener* said *might* happen someday actually *did* happen six years later in *Campbell v. Carpenter*, 279 Or 237, 566 P2d 893 (1977). The complaint in that case alleged that the defendant tavern keepers were liable for an auto accident caused by a customer to whom they had served alcohol after she was "perceptibly" intoxicated. The defendants were negligent, the complaint continued, because they knew or should have known that the customer would "leave the premises" by "operating a motor vehicle and [thus] constitute an unreasonable hazard and risk of harm to other persons on the public highway." 279 Or at 239.

On appeal from a verdict against them, the defendants did "not contend that these allegations fail[ed] to state a cause of action," only that there was no evidence to support them. *Id.* The court held that, in fact, there was some supporting evidence. *Id.* at 243. But it went on to say, in rather obvious *dictum*, that no such evidence was required, because, as a matter of law, it is reasonably foreseeable that the customer of a tavern will leave by driving: "Under the rule of *Rappaport [v. Nichols*, 31 NJ 188, 156 A2d 1 (1959)], * * * which we now adopt for application in such cases, a tavern keeper is negligent if, at the time of serving drinks to a customer, the customer is 'visibly' intoxicated because at that time it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile." *Id.* at 243-44. In a later case, *Chartrand*, discussed below, the court retreated from *Campbell's* foreseeable-as-a-matter-of-law holding. 298

Or at 693-95. But the case still stands for the proposition that a host can be found liable in negligence for injuries inflicted on a third party by an inebriated guest.[5]

A year after *Campbell*, in *Davis*, two taverns sold kegs of beer to minors without asking for proof of age. Another minor drank some of the beer, became intoxicated, and then drove his car carelessly, causing an accident in which someone was killed. This court held that the taverns were negligent *per se* – that is, liable as a matter of law – for having violated ORS 471.130(1), which, at the

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[5] In the meantime, however, the court in *Stachniewicz*, declined to recognize a claim for negligence *per se* based on the violation of ORS 471.410, which, then as now, prohibited the serving of alcohol to someone who is already "visibly intoxicated." The court said that the visibly-intoxicated standard was "particularly inappropriate for the awarding of civil damages because of the extreme difficulty, if not impossibility, of determining whether a third party's injuries would have been caused, in any event, by the already inebriated person." 259 Or at 587-88. "Unless we are prepared to say," the court continued, "that an alcoholic drink given after visible intoxication is the cause of a third party's injuries as a matter of law, a concept not advanced by anyone, the standard would be one almost impossible of application by a factfinder in most circumstances." *Id.* at 588. A few years later, in *Campbell*, the court reaffirmed its "observation" in *Stachniewicz* that the "visibly intoxicated" standard would be difficult-to-impossible for factfinders to apply. 279 Or at 241 n 2. But that didn't stop the court from concluding that a host could be found liable under common-law negligence for serving a guest who is already visibly intoxicated. The court did not explain, however, why the same standard would not be just as difficult, if not impossible, to apply in a case brought under a negligence theory of liability as under a statutory theory. Whatever the grounds for liability, it is still all but impossible to determine whether someone who is so drunk as to be visibly intoxicated would not have got into an accident without one more drink. To add to the confusion, the court decided, nine years after *Campbell*, to adhere to its conclusion in *Stachniewicz* that ORS 471.410 is "not an appropriate standard" for establishing negligence *per se*. *See Hawkins*, 307 Or at 265.

time, made it unlawful to sell liquor to any person "about whom there is any reasonable doubt of his having reached 21 years of age" without first requiring proof of age.

2. The 1979 Legislation

Alarmed by the rulings in *Weiner*, *Campbell*, and *Davis*, the restaurant and beverage industry lobbied the 1979 legislature for statutory limitations on any further expansion of liquor liability, which, they said, was making it difficult for purveyors of alcohol to obtain liability insurance. In response, the legislature enacted *former* ORS 30.950 and *former* ORS 30.955, which, as explained later, were combined later into what is now ORS 471.565. Those statutes initially read:

> "**ORS 30.950.** No licensee or permittee is liable for damages incurred or caused by intoxicated patrons off the licensee's or permittee's business premises unless the licensee or permittee served or provided the patron alcoholic beverages when such patron was visibly intoxicated."

> "**ORS 30.955.** "No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host served or provided alcoholic beverages to a [the?] social guest when such guest was visibly intoxicated."

Or Laws 1979, ch 801, §§ 1 and 2.[6]

[6] The same legislation created *former* ORS 30.960, which said that "no host shall be liable" for injury caused by an underage guest unless it was demonstrated that a reasonable person would have asked the guest for proof of age.

The 1979 statutes first came before this court in *Sager*, a case brought by the estate of a man who visited two cocktail lounges and then, upon leaving the second, fell and struck his head on the ground, suffering a fatal injury. His estate sued the lounge owners for serving the man "while he was visibly intoxicated," which, the estate alleged, caused his fall and subsequent death. *Sager*, 296 Or at 35. At that time, Oregon had not yet "recognized a common law claim against alcohol providers in favor of a person who suffers injury resulting from his or her own intoxication." *Id.* So the trial court dismissed the complaint for failure to state a claim. The Court of Appeals reversed, concluding that newly-enacted ORS 30.950 created a statutory liability in both the first-party and third-party settings – that is, when inebriated guests injure themselves and when they injure others. *Sager v. McClenden*, 59 Or App 157, 650 P2d 1002 (1982). The court construed the phrase "damages incurred or caused by intoxicated patrons" to "mean that licensees or permittees are liable both for damages 'incurred' by intoxicated persons as well as damages 'caused by' intoxicated persons." 59 Or App at 160.

This court disagreed. It held that, in enacting *former* ORS 30.950 and 30.955, the legislature did not intend to expand existing liability but rather to limit it. The court based its ruling on the text of the statutes and on a review of the legislative history. The court's historical analysis is worth quoting at length:

> "[W]e turn now to legislative intent as found in the legislative history of ORS 30.950. HB 3152, which repealed the Dram Shop Act

(former ORS 30.730) and became ORS 30.950, 30.955 and 30.960, was proposed by the Oregon Restaurant and Beverage Association and supported by various commercial alcoholic beverage servers. *The legislative history of ORS 30.950 indicates that its purpose was to limit the liability of liquor licensees and permittees to third parties.* 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* * * *, and *Davis* * * *. Commercial alcohol servers testified that the holdings in those two cases had made liability insurance much more difficult and expensive to obtain. * * * Before considering further the legislative history of HB 3152, a brief discussion of these two cases is in order.

"In *Campbell*, this court held that a tavern keeper is liable to third parties who are injured in an automobile accident that results from serving a visibly intoxicated customer because it is reasonably foreseeable that when the customer leaves the premises, he or she will drive an automobile. * * * The basis of the tavern keeper's liability is common law negligence, not violation of a statute.

"In *Davis*, this court held that the operators of two taverns, who each sold a keg of beer to minors, without requiring proof of age, were liable for the death of a third party killed in an automobile accident caused by another minor who consumed beer from both kegs. The basis of liability was negligence *per se* for violation of ORS 471.130(1),which makes it unlawful for a licensee to sell alcoholic beverages to anyone without requiring proof of age if there is doubt whether the customer is 21 years old. This statute was found to have been designed to protect the general public as well as minors. *Davis []*, 284 Or at 356.

"Section 1 of HB 3152, which, as modified, became ORS 30.950, was proposed to limit the holding in *Campbell*. As originally drafted, Section 1 provided that licensees would not be liable unless they were grossly negligent in serving visibly intoxicated patrons. The gross negligence standard, however, was deleted from the bill in committee. As finally approved, ORS 30.950 codified the holding in *Campbell*. The language the Court of Appeals found to create a claim for inebriated patrons is part of the original language proposed by the

Oregon Restaurant and Beverage Association to limit their liability to third parties.

"Section 3 of HB 3152, which became ORS 30.960,was proposed to limit the holding in *Davis*. Section 3 limited the liability to third parties of licensees and social hosts who serve underage patrons, by replacing the negligence *per se* rule of Davis with a reasonable person standard. Section 3 was approved without major revision.

"A thorough reading of the minutes of the committee hearings on HB 3152 fails to reveal a single mention of creating a claim in favor of injured patrons. *Throughout the hearings, discussion centered on licensees' liability to third parties.* We believe that if the legislature had intended to create a new claim, not available under the common law, there would have been some mention of it in the committee hearings. This is especially true of a type of claim as controversial as this one.

"Further considerations also lead us to the conclusion that the legislature intended no new claim for patrons injured off the premises by their own intoxication. 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 alcoholic 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 the liability originally created by judicial decision*."

296 Or at 37-40 (footnotes omitted; omissions in original indicated by ". . ."; emphasis added).[7]

[7] The court in *Sager* cited to the minutes of the legislative hearings. In this case, however,Smith Freed & Eberhard PC has submitted an *amicus curiae* brief that includes transcripts of those hearings. As that brief explains, the transcripts support the court's conclusions derived from review of the minutes.

The court in *Sager* said that it "agreed with the Court of Appeals' dissent" in that case. 296 Or at 39. The author of that dissent, Judge Richardson, concluded that *former* ORS 30.950 "only provides the condition under which a commercial alcoholic beverage server becomes liable to one who has a cause of action." *Sager v. McClenden*, 59 Or App at 162 (Richardson, J., dissenting). "In other words," he said, "it imposes a limitation on the liability created by judicial decisions." *Id.* He based that conclusion on "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." *Id.* His review, too, is worth quoting at length:

> "* * * As indicated, HB 3152 was drafted and presented by the Oregon Restaurant and Beverage Association. The representatives of commercial alcoholic beverage servers testified that Davis and Campbell expanded the liability of licensees and permittees to third persons to the extent that they were unable to afford the increased liability coverage premiums charged for assuming the added risk. The stated purpose of the bill was to limit the liability of licensees and permittees. As originally drafted, section 1 of the bill, which ultimately became ORS 30.950, provided that licensees and permittees would not be liable unless they were grossly negligent in serving an intoxicated patron. The House Committee on Judiciary amended the proposed bill to delete the gross negligence element. That section, as amended, became ORS 30.950. * * *
>
> "* * * * *
>
> "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. * * * If, as is evident, the proponents wished to limit their

> liability and thereby make liability coverage affordable, they certainly would not have drafted and proposed legislation which would extend their potential liability beyond that recognized at common law. * * *"

59 Or App at 162-65.

In sum, after reviewing the statutory language and the legislative history, *Sager* held that *former* ORS 30.950 and 30.955, the predecessors to current ORS 471.565, were not intended to create new, statutory claims, but rather to limit the common-law claims that had just been recognized in *Wiener*, *Campbell*, and *Davis*.

3. Later Cases

When the court decided *Chartrand*, just two years after *Sager*, it seemed to have forgotten, if only for a while, what it said in the earlier case. The plaintiff in *Chartrand* was injured in a head-on collision with a motorist who had been served at the defendant's tavern while she was visibly intoxicated. The defendant appealed from the judgment after a verdict for the plaintiff, and this court reversed because of error in the instructions. *Chartrand*, 298 Or at 692-95. The court went on, however, to suggest that the plaintiff *could have* brought a "statutory tort" claim "based on ORS 30.950." *Id.* at 695.

That remark was unnecessary to the ruling, because, as the court itself noted, the case had been "pled and tried under theories of common[-]law negligence and

negligence per se based on violation of ORS 471.410(1)." *Id.*[8] There was no claim under *former* ORS 30.950. Thus, the court's comment on the meaning of that statute was "in no way essential to the determination of the precise question before [the court]." *Blacknall v. Board of Parole*, 223 Or App 294, 300, 196 P3d 20 (2008). In other words, the comment was *dictum*.

This court itself said so, a few years after *Chartrand*, when it decided *Gattman*, which involved a claim against a tavern that served alcohol to a patron who was visibly intoxicated at the time and who later stabbed the plaintiff off-premises. The question presented in *Gattman* was "whether the enactment of ORS 30.950 provides a statutory remedy under the facts of this case." 306 Or at 20. The court answered no to that question, based largely on *Sager's* review of the legislative history and its conclusion that ORS 30.950 "impos[es] a limitation on the liability originally created by judicial decision." 306 Or at 22 (quoting *Sager*, 296 Or at 39-40). The court said:

> "Members of the 1979 legislature would be surprised to hear that in attempting to limit the liability of servers of alcoholic beverages to the standard stated in *Campbell*, they instead created licensee and permittee liability for all actions of an intoxicated customer upon satisfaction of the standard first stated in Campbell, *i.e.*, serving a visibly intoxicated person. * * *"

Id. at 22.

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[8] At the time, ORS 471.410(1) provided that "[n]o person shall sell, give, or otherwise make available any alcoholic liquor to any person who is visibly intoxicated." *Chartrand*, 298 Or at 692 n 2

The court went on to say: "We cannot overlook our later decision in *Chartrand*," where "we stated that on remand, the plaintiff could proceed against the tavern owner on a statutory tort theory under ORS 30.950." *Id.* at 23. But the court referred to that statement as "*dictum*," as indeed it was. And it indicated, perhaps in *dictum* of its own, that the statement was not very good *dictum* at that. The court quoted at length from a law professor's criticism of *Chartrand* for not examining the "wisdom" of recognizing a statutory action when there was already an existing common-law action. *Gattman*, 306 Or at 24 n 12 (quoting C. Forell, *The Interrelationships of Statutes and Tort Actions*, 66 Or L Rev 219, 266-67 (1987)).

More *dictum* appeared three years later in *Solberg v. Johnson*, 306 Or 484, 760 P2d 867 (1988). The plaintiff in that case was injured in an auto accident caused by Johnson, who was driving while intoxicated. The plaintiff sued Johnson and the owners of the tavern where Johnson had been drinking beforehand. After settling with the plaintiff, the tavern sought contribution from Johnson's stepfather and drinking companion, Howard, who paid for some of Johnson's drinks while on the tavern's premises. The tavern's complaint contained two claims, one based on common-law negligence, the other on *former* ORS 30.955, which, as noted above, provided that "[n]o *private host* is liable for damages * * * caused by an intoxicated social guest unless the private host has *served or provided* alcoholic

beverages to [the] social guest when such guest was visibly intoxicated." (Emphasis added.) Howard argued that the statute did not apply to him, because he was not Johnson's "host," but rather a co-patron, *i.e.*, a "guest" himself, and that he did not "serve" or "provide" alcoholic beverages to Johnson merely by paying for them. In his view, the tavern was the only "host" and the only server or provider of alcohol. The trial court agreed and dismissed the statute-based claim. The Court of Appeals court likewise agreed and thus affirmed the dismissal. *Solberg v. Johnson*, 90 Or App 90, 93, 750 P2d 1190 (1988).

This court saw it differently. It concluded, based on dictionary definitions of "social" and "host," that Howard qualified as a "social host" within the meaning of *former* ORS 30.955 and, therefore, that "it was improper for the trial court to grant Howard's motion to dismiss." 306 Or 489-90.[9] On the way to that holding, the court referred to *former* ORS 30.955 as a "statutory tort," *id.* at 488, but it did not explain what it meant by that term. Nor did it address the issue whether the statute was intended to impose statutory liability – which, again, was undisputed in that case. The only dispute was whether the statute, by its terms, applied in the circumstances of the case – whether Howard was a "host" and whether he "served or provided" alcohol to Johnson. *See* Answering Br of Resp Richard Howard at 3-

[9] The statute didn't actually use that term – "social host." It referred, instead, to "private host."

7 (accepting, in light of Chartrand, that "a person who violates ORS 30.955, causing injury to a third party, is * * * liable in tort to the third party.").

In any event, in deciding the case, this court did not mention, let alone overrule, *Sager* and *Gattman*, which, as explained above, squarely held, after review of the legislative history and statutory language, that *former* ORS 30.950 and 30.955 were *not* intended to create liability, but rather to limit it, an interpretation the court reaffirmed two months *after Solberg*, when it decided *Hawkins.*

Hawkins, like *Gattman*, was an action against a tavern for an off-site assault by a patron who had been served while visibly intoxicated. The complaint included claims for negligence and statutory liability under *former* ORS 30.950. Relying on *Gattman,* this court affirmed the dismissal of this statutory claim. 307 Or at 265. The court then explained the "operation of [*former*] ORS 30.950 in common law negligence actions." Relying on the statute's not-liable-unless construct – *i.e.*, "[n]o licensee or permittee is liable * * * unless * * *" – the court held "that in common law negligence actions governed by [*former*] ORS 30.950, serving alcohol to someone who is visibly intoxicated is the only conduct for which tavern owners may be held liable for off-premises injuries," and, therefore, "to state a common law negligence claim that is not barred by [*former*] ORS 30.950, the plaintiff must allege that the licensee or permittee served alcohol to the

person who injured the plaintiff when that person was visibly intoxicated." *Hawkins*, 307 Or at 268. But the court didn't stop there. It went on to say that, alleging service to a visibly-intoxicated patron was not enough to state a claim; the plaintiff still had to allege the other elements of common-law negligence, including foreseeable harm and unreasonable conduct. *Id.* at 268-69. In other words, the court held that serving alcohol to a visibly-intoxicated customer did not alone create liability.

In so holding, the court took a moment to explain that the effect of the statute did not vary depending on whether the claimant was injured in a car accident, the type of injury at issue in *Campbell* and *Chartrand*, or by some other means:

> "Nothing in the provisions of the statute limits the common law liability of licensees and permittees based on the manner in which the intoxicated patron injured the plaintiff. Furthermore, the legislative history does not indicate an intent to distinguish between the types of risks 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*. * * * "

307 Or at 268 n 6 (emphasis added).

4. Later Legislation

After the events at issue in *Hawkins*, the legislature made several changes in *former* ORS 30.950 and *former* ORS 30.955 – changes that didn't figure in that

decision. *Hawkins*, 307 Or at 266 n 5. In 1987, the two statutes were combined into one, which continued on as ORS 30.950. *See* Or Laws 1987, ch 774, § 13.[10] In 1997, some grammatical errors were corrected, *see* Or Laws 1997, ch 249, § 19, and a pre-suit notice requirement was added for any action against a commercial or social host for alcohol-related injury or damage. *See* Or Laws 1997, ch 841, § 1. Then, in 2001, the statute was amended to read as it does now, and as quoted earlier in this brief. *See* Or Laws 2001, ch 534, § 1. That same year, the statute was renumbered as ORS 471.565.

The legislation that amended the statute in 2001, like the legislation that enacted it in 1979, was passed in response to two decisions by this court. In *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 427, 9 P3d 710 (2000), the court concluded that a commercial host could be found liable in tort for serving alcohol to a guest who is visibly intoxicated and then in injures himself.

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[10] Oregon Laws 1987, chapter 774, section 13 amended *former* ORS 30.950 to read:

> "No licensee, permittee or social host is liable for damages incurred or caused by intoxicated patrons or guests off the licensee, permittee or social host's premises unless:
>
> "(1) The licensee, permittee or social host has served or provided the patron alcoholic beverages to the patron or guest, while the patron or guest was visibly intoxicated; and
>
> "(2) The plaintiff proves by clear and convincing evidence that the patron or guest was served alcoholic beverages while visibly intoxicated."

The court distinguished its decision in *Sager*, which, as discussed above, held that the guest could not bring a claim under *former* ORS 30.950. "That holding has no bearing on this case," the court said, because "plaintiffs in this case did not allege a claim under ORS 30.950." *Id.* at 425.

The plaintiff in *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000), was a passenger in a car that struck a power pole and overturned. He and the driver were both drunk, having spent the day consuming alcoholic beverages, some purchased from an inn and some from a convenience store. He sued them for negligence and statutory liability under *former* ORS 30.950, alleging both had served them while they were visibly intoxicated. 330 Or at 44-45. The defendants argued that they were not liable on either claim, because of the so-called "complicity doctrine," which, as developed in other states, "precludes recovery by a third person bringing an action to recover damages for injuries caused by an intoxicated person if the third person contributes to the inebriate's intoxication." 330 Or at 46-47. This court rejected that argument, explaining that the complicity doctrine was inconsistent with the legislature's decision to abolish contributory negligence as a defense. *Id.* at 47. The court also rejected the defendants' argument that, having bought some of his buddy's drinks, the plaintiff was a "social host" as described in *Solberg*, and that his status as such precluded his recovery somehow. *Id.* at 49. In light of the way the case was defended, the court

did not have to rule whether *former* ORS 30.950 created a remedy in favor of a non-complicit plaintiff. The defendants appear to have conceded that the plaintiff could bring a claim under the statute *but for* his involvement in overserving the driver of the car in which he was injured.

The legislature did not wait long to nullify *Fulmer* and *Grady*. When it next met, in 2001, it amended ORS 471.565 to provide, in what is now subsection (1), that a patron or guest who voluntarily consumes alcoholic beverages "does not have a cause of action" against the host, "even though" the patron or guest was served while visibly intoxicated; and to provide, in what is now subsection (2), that a host is "not liable" for damages caused by an intoxicated patron or guest "unless" the plaintiff proves that "[t]he plaintiff did not substantially contribute to the intoxication of the patron or guest." Or Laws 2001, ch 534, § 1. The former provision overturned *Fulmer*, and the latter overturned *Grady*. But the legislature did not otherwise alter the effect of the then-current statute. On that point, plaintiff agrees. *See* Blue Br at 18-19. So does the Court of Appeals. *Deckard*, 267 Or App at 50.[11] Thus, the post-2001 statute, like the pre-2001 statute, continues to

[11] And so does legislative counsel. The 2001 law began as Senate Bill 925, which was heard by the Senate Judiciary Committee. This summary of the bill appeared in a report to the committee written by legislative counsel:

"**WHAT THE BILL DOES**: Provides that an intoxicated person

(cont. next page)

limit, not create, liability, as explained in *Sager*, *Gattman*, and *Hawkins*, notwithstanding the *dictum* in *Chartrand*. The 2001 legislation simply adds two new restrictions to the restrictions on common-law claims in the original legislation. One of the new restrictions bars any claim by an intoxicated patron or guest for self-inflicted injury. The other bars any claim for injury to a third person who was complicit in the intoxication of the patron or guest.

> cannot sue the alcohol server for injuries sustained by the intoxicated person due to their [*sic*] intoxication. Prohibits action by person injured by intoxicated person if the injured person substantially contributed to the intoxication of the intoxicated person.
>
> "* * * * *
>
> "**BACKGROUND**: This measure would overrule recent Supreme Court decisions in *Fulmer v. Timber Inn Restaurant and Lounge* and *Grady v. Cedar Side Inn*, in which the court found that both the intoxicated person and the person who contributed to the intoxication of the intoxicated person have a cause of action against the alcohol server * * *."

Staff Measure Summary, SB 925, Senate Judiciary Committee, March 19, 2001.

On the House side, the director of government relations for the Oregon Restaurant Association testified in support of SB 925, saying: "The court in *Fulmer* recognized that the legislature has the power to abolish rules of the common law by statute and that is what SB 925 seeks to do." Testimony, House Judiciary Committee, SB 925, May 14, 2001, Ex E (statement of Bill Perry).

C. Summary

The text of ORS 471.565 is clear. So is the legislative history, as discussed by this court in cases applying the statute, not counting the *dictum* in *Chartrand* and *Solberg*. The statute does not create a remedy, but instead limits whatever remedy is available at common law. And a remedy *is* available. Before the legislature enacted *former* ORS 30.950 and 30.955, the predecessors to ORS 471.565, this court recognized a cause of action in negligence against a host who overserves a guest, causing injury to a third party. *See Campbell*. ORS 471.565 simply adds a requirement to that action: that the host serve the guest while the guest is visibly intoxicated. In that respect, the statute does not create statutory liability, as plaintiff alleged in his third claim. Instead, it circumscribes the liability alleged in the second claim, the claim against King for common-law negligence.

The Court of Appeals decision to the contrary makes little sense in light of the text of the statute and this court's precedents, especially *Hawkins*. As discussed above, *Hawkins* held that *former* ORS 30.950 added to the pleading and proof requirements for a third-party claim against a commercial host and, by implication, that the companion statute, *former* ORS 30.955, added to the pleading and proof requirements for a third-party claim, like the one here, against a *social* host. The claimants in such cases, *Hawkins* said, now have to plead and prove that

the host served a visibly-intoxicated guest *in addition to* pleading and proving the other elements of common-law negligence. 307 Or at 268-69. Those changes, made it harder for third parties to sue a commercial or social host for injuries inflicted by inebriated guests. In this case, however, the Court of Appeals said that the same language in *former* ORS 30.950 and 30.955, now contained in ORS 471.565, had the effect of *lessening* the pleading and proof requirements for claims against commercial and social hosts. A claimant can now recover, the Court of Appeals said, without proving the other elements of common-law negligence, including foreseeable harm and unreasonable conduct. It cannot be that the same legislation was intended to make it *both* harder *and* easier to sue purveyors of alcohol for injuries inflicted by inebriated guests. It can't be that the same legislation was meant to provide both a sword *and* a shield in liquor liability cases. The legislative history, not to mention the statutory language, indicates that it was meant to provide a shield.

This court should thus conclude that the trial court did not err in dismissing plaintiff's statutory-liability claim. For that reason, if no other, the trial court's judgment should be affirmed. There is, however, another reason for affirmance, discussed below.

D. Harmless Error

Even if the trial court erred in dismissing the statutory-liability claim, plaintiff would not be entitled, for that reason alone, to the new trial he seeks. "To warrant reversal[,] the ruling of the trial court must be not only erroneous, but also prejudicial." *Scanlon v. Hartman*, 282 Or 505, 511, 579 P2d 851 (1978). Or, putting it the other way around, to warrant reversal, the error must not be harmless. *See* ORS 19.415(2) ("No judgment shall be reversed or modified except for error substantially affecting the rights of a party.").

The appellant has the burden to prove harm, just as he has the burden to prove error. *See Shoup v. Wal–Mart Stores, Inc.*, 335 Or 164, 173-74, 61 P3d 928 (2003) ("ORS 19.415(2) * * * places the burden to make a record that demonstrates prejudicial error on whichever party loses in the trial court and then seeks reversal or modification of the judgment on appeal"). And, in this case, the appellant – plaintiff – hasn't carried that burden. If anything, the record demonstrates the *absence* of harm from that ruling, which, of course, did not terminate the proceedings below. The case continued on to trial and to a verdict on plaintiff's negligence claims. There is no reason to believe that it would have been tried differently, or would have resulted in a different verdict, if the dismissed claim had gone forward too. At least, plaintiff has offered no reason to believe that. He did not explain in his appellate briefs what evidence was received that

would have been excluded – or, conversely, was excluded that would have been received – *but for* that ruling. Nor does he explain which instructions that were given would have been refused – or, turning it around, which instructions that were refused would have been given – had the ruling gone the other way. For all one can tell from plaintiff's briefs below, the trial went the same without the statutory claim as it would have gone with it. The dismissal of that claim appears, then, to have made no difference in the case.

In the abstract, it *could have* made a difference. As noted earlier, the dismissal of the statutory claim left plaintiff with only a negligence claim against King. Both claims – the statutory claim and the negligence claim – arose out of the same act, namely, serving alcohol to Bunch while she was visibly intoxicated. *Compare* SER 4 (¶ 14) and SER 5 (¶ 19). But the claims differed in one key respect. Negligence requires proof of reasonably foreseeable harm. That's an element of the common-law tort. *See Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1, 17, 734 P2d 1326 (1987). It's not an element of a statutory claim. In creating such a claim, the legislature foresees the risk of harm from the proscribed conduct, which is why the conduct is proscribed. Thus, in a statutory-liability case, the claimant has to prove only that the defendant did what the statute forbids, causing injury to the claimant. To prove negligence in the same setting, the claimant also has to prove that the injury was reasonably foreseeable under the

circumstances. *See Nearing v. Weaver*, 295 Or 702, 708-09, 670 P2d 137 (1983) (explaining difference between statutory tort and negligence). Thus, if ORS 471.565 were a statutory tort, the plaintiff in a case based on that statute could recover merely by proving that the defendant served alcohol to a guest who was visibly intoxicated and that the plaintiff was injured as a result. The plaintiff would not have to prove that the injury was foreseeable when the alcohol was served.

Which is pretty much what this said in *Chartrand* about *former* ORS 30.950 (remember, this is *dictum*):

> "The legislature by stating, or implying in reverse language, that a tavern owner will be held liable for the acts of a person who has been served alcoholic liquor while visibly intoxicated, resolved the foreseeability issue as a matter of law. Thus, a plaintiff protected by such a statute need not resort to any concepts of negligence. Negligence is irrelevant. The sole question is whether the defendant engaged in acts prohibited by the statute and whether the violation of the statute resulted in injury."

298 Or at 696 (footnote omitted).

Returning to the present case, if ORS 471.565 created a statutory tort, as plaintiff contends, and if his claim based on that statute had not been dismissed, he would have been entitled to an instruction that King is liable if the jurors found that he served alcohol to Bunch while she was visibly intoxicated and that plaintiff was injured as a result. As it happened, *plaintiff got that instruction anyway*. The

judge told the jury that, "[t]o recover against Defendant King, the Plaintiff must prove two things":

> "One, that by clear and convincing evidence, Roland King served or provided Defendant Bunch alcohol when she was visibly toc [sic] – intoxicated[,] and, two, that Roland King's serving or presiding – providing alcohol to Diana Bunch while visibly intoxicated was a cause of damage to Plaintiff."

Tr 1649.

Under this instruction, plaintiff did not have to prove that King was negligent – *i.e.*, that he acted unreasonably in the face of reasonably foreseeable harm – in order to recover against him. Plaintiff had to prove only that King caused injury to plaintiff by serving alcohol to Bunch while she was visibly intoxicated. The verdict form told the jurors the same thing; it asked them to determine whether King was "at fault in a manner that caused damages to Casey Deckard." Tr 1650-51, 1801. It did not ask them to determine whether King was negligent in causing the damages.

Compare the instruction on recovery against King with the instruction on recovery against Bunch:

> "To recover against Defendant Bunch, the Plaintiff must prove two things by a preponderance of the evidence. *One, that the Defendant Bunch was negligent in at least one o[f], uh, the ways claimed in the Plaintiff's Complaint* and, two, that Defendant Bunch's negligence was a cause of damage to the Plaintiff."

Tr 1648-49 (emphasis added).

The Bunch-related instruction required proof of negligence, which is, of course, appropriate for a negligence claim. The King-related instruction, by comparison, didn't mention negligence, even though the claim against King was a negligence claim too. That instruction conformed, instead, to the statutory-tort discussion in *Chartrand*: "The sole question is whether the defendant engaged in acts prohibited by the statute and whether the violation of the statute resulted in injury." 298 Or at 696. The court told the jurors that "[t]o recover against Defendant King," plaintiff had to "prove two things" – that King "served or provided alcohol" to Bunch while she was visibly intoxicated, and that doing so "was a cause of damage to [p]laintiff." The jury was *not* instructed that plaintiff also had to prove negligence by King in order to recover.

The Court of Appeals noted that, after these instructions on the requirements for recovering against King and Bunch, respectively, the trial court gave a long instruction on what constitutes negligence, including the foreseeability requirement of that tort.[12] But the jurors would not have related that instruction to the claim

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[12] The instruction reads:

> "Common Law Negligence. The law requires every person to use reasonable care to avoid harming others. Reasonable care is the degree of care and judgment used by reasonably careful people in the management of their own affairs to avoid harming themselves or others.

(cont. next page)

against King, rather than the claim against Bunch, because, again, they were not instructed that plaintiff had to prove that King was negligent in order for plaintiff to recover against him – only that he served alcohol to Bunch while she was visibly intoxicated and that doing so was a cause of plaintiff's injury. And the verdict form did not ask them whether King was "negligent," only whether he was "at fault," which could consist of serving alcohol to someone who was already inebriated, visibly so.

The Court of Appeals was mistaken, then, when it said, at the end of its opinion, "[n]othing told the jury that liability for such conduct [*i.e.*, serving alcohol

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> "In deciding whether a party used reasonable care, consider the dangers apparent or reasonably foreseeable when the events occurred. Do not judge the party's conduct in light of subsequent events. Instead, consider the party – what the party knew or should have known at the time.
>
> "A person is negligent, therefore, when the person does some act that a reasonably careful person would not do or fails to do something that a reasonably careful person would do under the similar circumstances.
>
> "A person is liable only for reasonably foreseeable consequences of their actions. There are two things that must be foreseeable. One, the Plaintiff must be within the general class of persons that one would reasonably – that one reasonably would anticipate might be threatened by the Defendant's conduct. Two, the harm suffered must be within the general class of harms that one reasonably would anticipate might result from the Defendant's conduct."

Tr 1649-50.

to someone who is visibly intoxicated] followed without proof of negligence." 267 Or App at 54. In fact, the trial court told the jurors exactly *that* when it instructed them that plaintiff had to "prove two things" to recover against King: (1) that King "served or provided Defendant Bunch alcohol when she was visibly * * * intoxicated"; and (2) that "providing alcohol to Diana Bunch while visibly intoxicated was a cause of damage to Plaintiff."

In the end, then, plaintiff got, perhaps by mistake, exactly the instruction he would have gotten if the trial court had not erred (assuming it did) in dismissing his statutory-liability claim. Accordingly, the error was harmless. At least, plaintiff hasn't proven that it was harmful. As noted above, he hasn't explained how, apart from the instructions, the dismissal affected the trial to his detriment. Accordingly, he is not entitled to a retrial, even if the ruling was erroneous. He is not entitled to a second bite at the apple. The Court of Appeals erred in concluding otherwise.

VI. CONCLUSION

The Court of Appeals decision should be reversed, and the trial court judgment should be affirmed.

Respectfully submitted,

/s/ Thomas M. Christ

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For Petitioner on Review

Certificate of Compliance with ORAP 9.05(3)(a)

Brief length

I certify that this brief complies with the 14,000-word limit for briefs on the merits in ORAP 5.05(2)(b), and that the word count of this brief as described in ORAP 5.05(2)(a) is 9,524 words.

Type size

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 footnotes as required by ORAP 5.05(4)(g).

/s/ Thomas M. Christ

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Thomas M. Christ

Certificate of Filing and Service

I certify that I filed the attached brief by electronic filing on May 21, 2015. I further certify that on the same date, I served a copy of this brief on the following lawyers by using the electronic service function of the eFiling system (for registered eFilers) or by first-class mail (for those who are not registered eFilers):

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