IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiff-Appellant, Respondent on Review,

v.

MATTHEW A. CROSLIN,

Defendant-Respondent, Petitioner on Review,

and

TYLER GREGORY SMITH,

Defendant.

Multnomah County Circuit Court

Case No. 1106-07278

CA No. A55376

SC No. 062571

AMENDED BRIEF ON THE MERITS OF PETITIONER ON REVIEW

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

Opinion Filed: July 9, 2014

Disposition: Reversed and Remanded

Author of Opinion: Judge Lagesen

Concurring Judges: Duncan and Wollhein

Filed January 2015

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I. Nature of the Action

Respondent-on-Review/plaintiff Jennifer J. Baker ("plaintiff") sought wrongful death damages against Petitioner-on-Review/defendant Mathew A. Croslin ("Croslin") and also against co-defendant Tyler Smith ("Smith"). As to Croslin, this is a homeowner/social host liquor liability case, controlled by ORS 471.565(2). Under the statute, a homeowner can be liable for damage caused by an intoxicated guest only if the homeowner "served or provided alcoholic beverages to the…guest while the…guest was visibly intoxicated."

On the evening in question, Croslin hosted a BYOB (Bring Your Own Bottle) gathering at his house. While Croslin was in his bedroom, decedent Tyler Baker ("Baker" or "Tyler Baker") and Smith were in the kitchen/dining room area, engaging in a "quick draw" gunplay scenario. Tyler Baker, who had become intoxicated, put his loaded gun to Smith's head, and Smith, who had also become intoxicated, reacted by reaching for his own loaded gun, and he accidentally shot and killed Tyler Baker.

The trial court granted defendant Croslin's motion for summary judgment based on the proposition that Croslin did not serve or provide any alcohol to Smith while he was visibly intoxicated, and entered a limited money judgment for defense costs. Plaintiff then settled with Smith and filed this appeal.

The Court of Appeals reversed, even though it assumed that the last drink consumed by Smith, while he was visibly intoxicated, was a shot of rum that was owned by Tyler Baker (and not Croslin). Nonetheless, the court held that Croslin could still be liable. According to the Court of Appeals, it did *not* necessarily matter that Croslin did not own, serve or provide the rum. Rather, the key to liability was that "a reasonable factfinder could infer that defendant had *control over that bottle* of Cockspur rum…" 264 Or App at 201 (italics added).

II. Legal Question Presented on Review and Proposed Rule of law

The legal question presented in this appeal is as follows- can a social host be liable for damage caused by a guest's over-consumption of his own alcohol, or the over-consumption of the alcohol belonging to another guest, while at the home of the host, such as what might occur at a BYOB gathering?

This court should approve a rule of law that a social host cannot be liable for damage caused by a guest who over-consumes his own alcohol, or the alcohol belonging to another guest, while at the home of the host. Rather, liability requires that the host *directly serve or provide* alcohol to a guest while the guest is visibly intoxicated.

III. Material Facts for Determination on Review

On the night in question, there was a gathering at Croslin's house, which was largely a BYOB (Bring Your Own Bottle) event, with attendees bringing their

own alcohol. (Supp ER 4, 5; ¶ 3). The only alcohol that Croslin owned and "provided" to guests that evening was a quarter-bottle of already-opened vodka that was in his freezer, from which attendees could help themselves. (Supp ER 4, 5; ¶ 7). Smith attended the gathering, and brought with him, his own beer. (Supp ER 4, 5; ¶ 6). He had nothing to drink prior to arriving, and his first two drinks of the evening were vodka Squirts, which Smith mixed himself using Croslin's vodka. (Supp ER 4, 5; ¶¶ 6, 7). Smith was, of course, *not* visibly intoxicated when he consumed these first two vodka Squirts. (Supp ER 4, 5; ¶ 7).

For the remainder of the evening, Smith consumed his own beer, except that a few minutes before the shooting, *he had a shot of rum offered to him by and belonging to decedent Tyler Baker*. (Supp ER 4, 5; ¶¶ 4, 7).

When the shooting occurred, there was only Tyler Baker, Smith and Croslin still at the house, with Croslin in another room (Supp ER 4, 5; ¶ 9). Smith described the shooting to the police and in his deposition, and testified that he and Tyler Baker had finished acting out a few crime scenarios with unloaded guns. (ER 8; Supp ER 22, 23). Baker and Smith had reloaded their guns, and Baker then unexpectedly decided to act out one last scenario and he put his gun to Smith's head, and Smith simply reacted by pulling the trigger on his (now-loaded) gun (ER 8; Supp ER 22, 23).

On review, the facts surrounding the ownership and service of the final shot of rum consumed by Smith shortly before the shooting have become important, as Croslin believes he cannot be liable because the rum was owned and served by Tyler Baker; the Court of Appeals, on the other hand, held that Croslin *could* be liable, even if the rum was owned and served by Tyler Baker.

The facts relating to the ownership and service of the rum are not in dispute. Croslin testified:

> My friend Tyler Baker was a big rum drinker, and he often tried to hide some of his rum consumption from his wife Jennifer Baker. To that end, earlier in the day on June 10, Tyler Baker asked me if I would do him a favor and purchase for him a bottle of rum. I did so, and early in the evening of June 10, 2010, Tyler Baker reimbursed me for the cost of the rum. There is no doubt that this rum belonged to Tyler Baker. He, alone, was drinking the rum, prior to offering a single shot of the rum to Tyler Smith, Brian Johnson and me.

(Supp ER 4-5; ¶ 4).

This explanation was corroborated by Donald Warndahl- another guest at the party that evening- who testified that Croslin gave him the same explanation as to the ownership of the rum, about a week after the shooting. (Supp ER 8; ¶ 3).

And it is clear that the rum did *not* come from what Croslin already had in his house. That is, the undisputed evidence is that none of Croslin's own rum was consumed, or even touched, that evening. (ER 17; lines 20-21- "It's still probably the exact same assortment that there is today").

IV. Summary of Argument

The central question on appeal concerns the liability, under ORS 471.565(2), of a homeowner for alcohol consumed by a guest while at the house, if the alcohol consumed was *not* owned, provided or served by the homeowner (such as occurs in a so-called "BYOB" party).

The Court of Appeals relied on two Oregon cases and two non-Oregon cases to reach a conclusion that the jury in this case will have to decide if Croslin had sufficient "control over the alcohol supply" that Smith consumed. These four cases, actually, lead one to the conclusion that for there to be liability under ORS 471.565(2), the host must *directly serve or provide* alcohol to a guest while the guest is visibly intoxicated, and the host is *not* liable if a guest consumes alcohol belonging to the guest or another guest.

This is consistent with the fact that that the Oregon Legislature has consistently narrowed social host liquor liability. Nearly every single amendment of the Oregon dram shop laws in the past quarter of a century has limited, rather than expanded, the scope of alcohol provider liability. Accordingly, any expansion of the Oregon liquor liability laws should be left up to the legislature.

V. Argument

A) The trial court's decision in favor of Croslin, and the reversal by the Court of Appeals.

It is alleged by plaintiff that defendant Tyler Smith, while intoxicated, accidentally shot and killed Tyler Baker at the home of Matthew Croslin, while Croslin was in another room of the house. Tyler Smith and Tyler Baker were Croslin's two best friends. Plaintiff Jennifer Baker was the wife of Tyler Baker and is the personal representative of his estate. She brought a wrongful death action against both Croslin and Smith.

The claim against the shooter Smith was obvious, as he had pleaded guilty to a criminal charge of negligent homicide. The claim against homeowner Croslin was not as obvious and was based on a theory that "Croslin served Smith alcohol, and unreasonably continued to serve him alcohol when he was visibly intoxicated." (Supp ER 1; ¶ 2).

ORS 471.565(2) provides in pertinent part:

> (2) A * * * 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 * * * social host served or provided alcoholic beverages to the patron or guest while the patron or guest was visibly intoxicated[.]

The key fact developed in the trial court was that the gathering on the night in question was largely a BYOB affair, and as the evening went on, Smith consumed beer that he, himself, had brought to the house, and then shortly before

the shooting, Smith drank a shot of rum that belonged to decedent Tyler Baker. Croslin moved for summary judgment, contending that a host is not liable for a guest consuming his own alcohol or the alcohol of another guest, while at the host's home, relying, in part, on cases from Massachusetts. The trial judge agreed, granting summary judgment to Croslin. Plaintiff than settled with Smith and filed this appeal.

In the Court of Appeals, Croslin put in his Answering Brief, "Apparently plaintiff concedes that if a guest consumes his own alcohol at a BYOB party, such alcohol is not 'served or provided' by the social host homeowner under ORS 471.565(2)(a)… See *Ulwick v. DeChristopher*, 411 Mass 401, 582 NE2d 954 (1991) (host not liable for negligent driving of motorist who brought his own alcohol to party)." (Respondent's Answering Brief; p. 14-15).[1]

The Court of Appeals disagreed, and reversed the summary judgment for Croslin. The Court of Appeals decision assumed that the last drink consumed by Smith (while he was visibly intoxicated) was a shot of rum that belonged to Baker. But the court held that "a reasonable factfinder could infer that defendant had

[1] Interestingly, in its analysis, the Court of Appeals cited a more recent Massachusetts case, *Juliano v. Simpson*, 461 Mass 527, 962 NE2d 175 (2012), which affirmed a judgment, as a matter of law, *for* a social host, relying in large part on the earlier Massachusetts *Ulwick* case.

control over that bottle of Cockspur rum…" 264 Or App at 201.[2] Apparently, the Court of Appeals believed that if one has "control over the alcohol supply" (264 Or App at 200) that person can be liable under ORS 471.565(2), even if that person did not directly serve or provide the alcohol.

As will be explained below, the Court of Appeals was mistaken.

B) The cases relied on by the Court of Appeals support the proposition that social host liquor liability requires that the host *directly serve or provide* alcohol to a guest while the guest is visibly intoxicated.

The Court of Appeals relied on two Oregon cases and two non-Oregon cases to reach a conclusion that the jury in this case will have to decide if Croslin had sufficient "control over the alcohol supply" that Smith consumed. The four cases cited by the Court of Appeals, actually, lead one to the conclusion that social host liquor liability requires that the host *directly serve or provide* alcohol to a guest while the guest is visibly intoxicated. And these four cases also lead one to the conclusion that this a question that should be decided as a matter of law.

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[2] To the extent the Court of Appeals believes that the jury could find that Smith's final drink may have been whiskey, and not rum, the court is incorrect. The two other persons who observed Smith take his final drink of the evening, testified they were sure that it was the Baker Cockspur rum that Smith consumed. The only evidence to the "contrary" is from Smith's deposition where he was asked what his final drink of the evening was, and he responded, "I don't know if it was whiskey or rum or what." (ER-35, line 17). Clearly, "I don't know" or "I don't remember" testimony is not evidence controverting positive testimony. For instance, if two witnesses testify the traffic light was red, and ten other witnesses testify that they either don't know or don't remember what color the traffic light was, then the red light testimony is considered uncontroverted.

In *Wiener v. Gamma Phi ATO Frat.*, 258 Or 632, 485 P2d 18 (1971), the court affirmed judgments as to at least seven defendants, *as a matter of law*, in a liquor liability case, allowing a claim to proceed against *only* a fraternity that directly served alcohol to a minor. The court held that there could be liability only to a defendant who had "direct involvement in serving the liquor" to the minor. 258 or at 643. As such, the court ruled there could be no liability to the owners of the land on which the fraternity held the party, and there could be no liability to the member of the fraternity who purchased the alcohol before the party started, but did not have "any control over the *direct* dispensation of the alcohol at the party." 258 Or at 640 (italics added). The facts are very similar to the case at bar, where the undisputed evidence is that Croslin actually purchased a bottle of rum for Baker during the afternoon before the party, that Baker took possession of the rum and had reimbursed Croslin earlier in the evening, and that Baker offered Smith a shot of this rum shortly before Smith accidentally shot Baker.

Wiener was followed by *Solberg v. Johnson*, 306 Or 484, 760 P2d 867 (1988), where the court held that one who purchases a drink for his visibly intoxicated stepson at a tavern could be considered a social host under the Oregon dram shop laws (now numbered ORS 471.565). The court was quick to point out that the decision "should not be read as overruling *Wiener* [which] is still good law." 306 Or at 491. The court noted that the trial court dismissed the case at the

pleading stage, and further noted, "In the present case it is alleged that there was *direct* control [of serving or providing the alcohol]." 306 Or at 492 (italics added). This concept of *direct service or provision* of the alcohol is nowhere to be found in the Court of Appeals opinion, and all that mattered to the Court of Appeals is that, somehow or other, Croslin could be found by the jury to have "control over the alcohol supply."

In footnote 3 of the Court of Appeals opinion, the court cites two cases that it believes are "consistent" with the approach it is taking. Both of these cases found *for* the defendant *as a matter of law*.

In *Juliano v. Simpson*, 461 Mass 527, 962 NE 2d 175 (2012), the court affirmed a summary judgment in favor of a social host who allowed a minor to consume his own alcohol at BYOB party she hosted. The host noted the intoxication of the minor and offered to drive him home, but the minor insisted on driving himself and got into an accident. Relying on earlier cases, the court held to be liable, "the host must *actually* serve or make the host's *own* liquor available." 461 Mass at 534. (emphasis added). The court explained:

> In reaching these decisions, we have been mindful of policy considerations, examining them most thoroughly in *Ulwick v. DeChristopher*, *supra* at 406–407, 582 N.E.2d 954. In that case we expressed doubt that a social host can effectively prevent a guest from drinking the guest's own supply of alcohol, in contrast to the host who furnishes liquor to guests. The latter host, we said, is like a bartender in a licensed establishment who is well situated to "shut off" guests who should not be drinking because of age or intoxication, and we

> noted that "[s]ociety may fairly expect" a host in the latter situation to take such action. *Id.* at 406, 582 N.E.2d 954. We acknowledged also that there were "a number of practical difficulties" inherent in imposing on social hosts a duty "to police the conduct of guests who drink their own liquor." *Id*

461 Mass at 535

The other case cited in footnote 3 of the Court of Appeals opinion is *Knight v. Rower*, 170 Vt 96, 742 A2d 1237 (1999). There, the court affirmed a motion to dismiss as to landowners who allowed alcohol to be consumed on their land. The court relied heavily on *Ulwick v. DeChristopher*, 411 Mass 401, 582 NE2d 954 (1991), refusing to hold that "control over land is the same as control over alcohol that is consumed at that land." 170 Vt at 102.

In the case at bar, it seems that the Court of Appeals is effectively holding that control over the land amounts to control over the alcohol that is consumed at that land. This court should make it clear that this is not the law in Oregon, and that, to be liable, the social host has to *directly serve or provide* the alcohol to the guest.

C) Social host liquor liability in Oregon has been narrowed by the Oregon Legislature, and it should not be expanded by the Oregon Court of Appeals or by this court.

The Oregon Legislature has consistently narrowed social host liquor liability. Indeed, nearly every single amendment of the Oregon dram shop laws in the past quarter of a century has limited, rather than expanded, the scope of alcohol

provider liability, and any expansion of liability should be left up to the legislature. For instance, ORS 471.565(1) now expressly states that injuries to the intoxicated guest, himself, are not recoverable, as this court recognized was the legislature's intent of an earlier version of the statute. *Sager v. McClenden*, 296 Or 33, 672 P2d 697 (1983).

And in 2001, the Oregon Legislature added a "complicity" element to the statute, so that a social host can no longer be liable if the injured party substantially contributed to the guest's intoxication, ORS 471.565(2)(b). By doing so, the legislature effectively overruled this court's holding in *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000), allowing such claims even if the plaintiff contributed to the guest's intoxication.

Clearly, social host liability should be narrowed, not expanded, as the Court of Appeals has done. The death of Mr. Baker was certainly unfortunate, but that does not justify such a dramatic expansion in the scope of Oregon liquor liability law. A social host can be liable for an injury or death that occurs at his home, but, the Oregon Legislature has specifically spoken to the issue, and such claims cannot be brought unless there was actual direct service or provision of alcohol by the host (to a guest who is visibly intoxicated).

Furthermore, allowing homeowner liability simply because a guest chose to consume his own alcohol at the host's house, makes such liability totally random.

What is a homeowner to do? Try to separate a guest from his own alcohol? That might be a tort of its own, and it can lead to all sorts of altercations and the like. The uncertainty and inability to develop a workable standard in this context is precisely why liability should be limited to the certain and identifiable act that the legislature has already identified after considered determination of the issue: direct service or provision of alcohol. Everyone knows what it means to "serve" or "provide," and as a corollary, everyone knows precisely what type of conduct is proscribed by law.

The same cannot be said of the Court of Appeals' unworkable expansion of liquor liability law in this case. For instance, under the Court of Appeals' decision, just what is the jury supposed to decide? Is it, "Did Croslin have control over the rum belonging to Baker?" What does that even mean, and why is that important? And just how is the jury supposed to be instructed as to "control"?

VI. Conclusion

This case involves no direct service or provision of alcohol by Croslin to Baker. This court should reverse the Court of Appeals and affirm the trial court, announcing a rule of law that for there to be liability under ORS 471.565(2), the host must directly serve or provide alcohol to the guest while the guest is visibly

intoxicated, and the host cannot be liable if a guest consumes alcohol belonging to the guest or another guest.

Dated: January 15, 2015.

Respectfully submitted,

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DATED: January 15, 2015.

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PROOF OF SERVICE

I certify that I electronically filed **AMENDED BRIEF ON THE MERITS OF PETITIONER ON REVIEW** with the Oregon State Court Administrator, Appellate Records Section, by using the appellate Electronic Filing system on December 10, 2014.

I further certify that I directed **AMENDED BRIEF ON THE MERITS OF PETITIONER ON REVIEW** to be served on the attorney below on December 10, 2014, by mailing two copies, with postage prepaid, in an envelope addressed to:

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