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.

BRIEF ON THE MERITS OF *AMICUS CURIAE*

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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I. INTRODUCTION

When the Legislature created Oregon's Dram Shop Statute[1] in 1979, it limited the liability of providers of alcohol—restaurants, bars, hotels, wineries, and individual Oregonians—in an effort to balance the interests of plaintiffs injured by intoxicated individuals and providers of alcohol.

In order for this Court to decide whether ORS 471.565 (2013) gives rise to statutory liability, it must examine the legislative intent behind Oregon's Dram Shop Statute. *See Gattman v. Favro*, 306 Or 11, 14, 757 P2d 402 (1988) ("Whether a statute creates a duty, or enacts a standard of care, is determined by discerning what the legislature intended."). After exhaustive research of legislative hearings, minutes, and exhibits, it is apparent that the Legislature did not intend for the Dram Shop Statute to give rise to statutory liability. In fact, the purpose of the Dram Shop was two-fold. First, the Legislature recognized that injured third parties should be able to recover from restaurants, hotels, bars, and other providers of alcohol that improperly serve visibly intoxicated persons. Second, those establishments must be capable of actually paying a judgment if they are found liable. The hearings demonstrate that the Legislature knew that liquor liability

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[1] For purposes of this brief, I will refer to ORS 471.565, *former* ORS 30.950, and *former* ORS 30.960 collectively as the "Dram Shop Statute." I have deliberately not used the term "dram shop act" in order to distinguish between Oregon's repealed dram shop act, *former* ORS 30.730 and the limited liability statute, ORS 471.565.

insurance must be available and affordable in order to provide a means of recovery. The typical bar, today as much as in the 1970s, is a small business with little to no assets—meaning that without insurance, even if an injured plaintiff has a right to recover, that right is meaningless if there is nothing to recover at the end of the day.

To that end, the Legislature balanced the interests of plaintiffs with the interests of businesses by allowing injured third parties to recover from bars, hotels, restaurants, wineries, and social hosts on the condition that their liability be limited to situations where they serve a person who is visibly intoxicated and harm to third parties is a foreseeable result of that over service. The Dram Shop Statute's dual purpose is to make recovery available to plaintiffs while at the same time limiting that recovery for the benefit of all that serve alcohol, from the neighborhood pub and microbrewery around the corner, to the established winery in the Willamette Valley, and even to homes of ordinary Oregonians that host private parties.

The availability and affordability of liquor liability insurance has been the focus of every major change to liquor liability law beginning with enactment of the Dram Shop Statute in 1979. To illustrate the Legislature's concern, the liquor liability insurance problem was so pronounced that at one time, there were only two insurers that would underwrite liquor liability in Oregon and only one in four

businesses that served alcohol had liquor liability insurance. Plaintiffs with legitimate claims were not recovering, and neighborhood bars, restaurants, hotels, and other licensees were either going out of business or living in fear of a lawsuit that could likely bankrupt them.

Prior to enactment of the Dram Shop Statute, the state of liquor liability was unclear and unpredictable at best. Insurers simply avoided writing policies for liquor liability in Oregon because the risks were too high in light of the confusion in the law. By enacting the Dram Shop Statute, the Legislature intended to retreat from case law that increased risks for insurers and thereby induce insurers to write liquor liability insurance in Oregon. As discussed below, the Dram Shop Statute represents a balance between providing injured plaintiffs with a right to recover while not deterring the growth of business and tourism through the legislatively chosen mechanism of limiting alcohol providers' liability in order to decrease insurance risks in the state. The concept that a statutory tort exists separate and distinct from a negligence claim flies completely in the face of the plain language of the statute, its extensive legislative history, and prior opinions of this Court.

The source of the confusion as to whether a statutory tort exists arose out of *dictum* in *Chartrand v. Coos Bay Tavern*, 298 Or 689, 696 P2d 75 (1985). The discussion below addresses directly the *Chartrand dicta* that stated the Dram Shop Statute creates statutory liability, has no legal support. (As discussed below, the

issue of statutory liability was based on a question from the Court—it was not litigated in the trial court. *Chartrand,* 298 Or at 695.

Amendments to the Dram Shop Statute have had the purpose of making insurance available and affordable or addressing court decisions that went beyond the intent of the Legislature. A review of the legislative history behind the amendments to the Dram Shop Statute emphasizes that the Legislature has never intended to create a new stand alone right of action, but instead intended to limit liability in order to balance the interests of injured plaintiffs and providers of alcohol.

Traditionally, accessing legislative history has been difficult, especially for older legislative sessions, such as those of the 1979 Legislature, which are at the heart of the issues in this case. The 1979 hearings are on reel-to-reel tapes, and subsequent hearings are on audio cassette, which means that locating and obtaining the correct audio reel or tape takes time, and then searching each reel and tape for the beginning of the hearing takes considerable time and effort. Given the difficulty of access to the actual hearing materials, some courts have placed great reliance on the minutes of hearings as a source of legislative history. While the minutes sometimes fairly summarize the content of the hearings, in many instances, the minutes are incomplete and sometimes even incorrect. For this reason, we have provided a full transcript of the actual hearings. We have also

included a disc containing the audio for all of the hearings, allowing the Court and the parties to listen to the actual hearings, as well as to verify the accuracy of the transcript.[2]

II. LEGISLATURE LIMITS LIQUOR LIABILITY TO BALANCE INTERESTS OF INJURED PLAINTIFFS AND OREGON BUSINESSES

As discussed below, the basis of the 1979 enactment of the Dram Shop Statute and its subsequent amendments was to limit liability to make insurance more available. Interestingly, it was not just providers of alcohol that asked that liability be limited.

In 1987, the 64th Oregon Legislative Assembly was facing an insurance crisis that led to sweeping insurance reforms through Senate Bill (SB) 323 (1987). One of the issues addressed in SB 323 was liquor liability. In an early committee hearing, one stakeholder, Carol Satterfield, offered the following testimony on behalf of Mothers Against Drunk Driving (MADD):

> "The question that was posed to me was: 'Is there a liability insurance crisis?' And I would say 'Yes. Unqualified yes.' When responsible owners and operators of restaurants and taverns cannot get liability insurance—either because it's too expensive, or because it simply isn't available—I think

[2] The transcript was prepared by my office. To determine the speaker, oftentimes we would use the minutes of the hearings. However, given the various factors of poor audio quality, background noise, cross talking, etc., or a mistake by our transcriptionist, there may be an occasional correction needed to the transcript. Nonetheless, from my review of Oregon appellate cases, the actual hearings have not previously been submitted to the Court, and our hope is that it finds the audio and transcript helpful.

> that is a real travesty. And when a—particularly when a responsible owner or operator who has never had a claim filed against them can't get insurance, then there's something wrong with the system. To me, that implies that the system is broken and it needs to be fixed."

SB 323, Senate Jud. Comm., January 21, 1987, Hearing, Tape 4A (Appendix, App-45). Insurance had become so expensive for tavern, restaurant, and hotel owners that even MADD supported SB 323, a bill that proposed to make insurance available and more affordable by raising the standard of proof for liquor liability claims from preponderance of the evidence to clear and convincing evidence. MADD, as well as many other stakeholders, realized that in order to compensate victims of drunk drivers who are overserved, there must be funds available. Each legislature that addressed the issue of liquor liability faced a similar problem:

> "[A]s we go through these bills and you come back and testify in more detail, there are ways to reduce premiums, and I think all of us recognize that. We can eliminate the cause of action, for example. But we have some policy decisions to make."

Id. (Chairman Bill Frye) (App-40). The result of the Legislature's policy decisions was the Dram Shop Statute, which did not eliminate the existing common law cause of action, but rather allowed plaintiffs to continue to bring common law claims while limiting those claims to a narrow source of liability—serving visibly intoxicated patrons.

The legislative history of the 1979 Legislature is the most relevant and important to this case because the Court of Appeals relied completely on

C*hartrand* and its analysis of the legislative history of House Bill (HB) 3152 (1979). *See Deckard v. Bunch*, 267 Or App 41, 45–47, 340 P3d 655 (2014). With the benefit of not only the minutes, but the actual hearings, there can be no doubt that *Chartrand*, and by extension the decision of the Court of Appeals below, is simply wrong.

A. Liquor Liability Case Law Prior to Dram Shop Statute

The 1979 legislative session focused on two cases decided since the previous session: (1) On July 20, 1977, *Campbell v. Carpenter,* 279 Or 237, 566 P2d 893 (1977); and (2) On November 29, 1978, *Davis v. Billy's Con-Teena,* 284 Or 351, 587 P2d 75 (1978). The less discussed part of the Dram Shop Statute is the provision limiting liability for providing alcohol to a minor. Examining this change to the law assists in analyzing the section on service to a visibly intoxicated person.

The 1979 Legislature heard repeated testimony that the section of HB 3152 on providing alcohol to a minor was intended to establish a "pre *Billy's Con-Teena* standard of common law negligence for finding third party liability that was expressed in the *Wiener* case in 1971." HB 3152, House Jud. Comm., June 29, 1979 – 1:30 p.m., Hearing, Tape 96 (Dave Dietz, Oregon Restaurant and Beverage Association) (App-5). The Legislature ultimately adopted HB 3152, agreeing that *Billy's Con-Teena* "went too far." HB 3152, House Jud. Comm., June 26, 1979 –

1:30 p.m., Hearing, Tape 96 (Rep. Lombard) (App-16). Representative Frohnmayer,[3] agreed that "*Wiener* is okay. I am much less secure about *Con-Teena*, in fact, I think that went too far." *Id.* (App-24). In order to understand what the "pre *Billy's Con-Teena* standard" of liquor liability was, it is necessary to examine the development of case law leading up to the 1979 Legislature.

Before HB 3152 became law, Oregon's "Dram Shop Act"[4] provided a cause of action for the family of a patron for service of alcohol to an "intoxicated person or habitual drunkard," but completely excluded recovery to third parties injured by intoxicated persons. However, in *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or 632, 485 P2d 18 (1971), this Court allowed a plaintiff to proceed on a common law negligence claim against a fraternity for negligently serving alcohol to a minor that drove a vehicle which injured the plaintiff when he crashed into a building. *Id.*

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[3] Who guided much of the discussion and policy for HB 3152.

[4] *Former* ORS 30.730 provided:

> "Any person who shall bargain, sell, exchange or give to any intoxicated person or habitual drunkard spirituous, vinous, malt or intoxicating liquors shall be liable for all damage resulting in whole or in part therefrom, in an action brought by the wife, husband, parent or child of such intoxicated person or habitual drunkard. The act of any agent or employee shall be deemed the act of his principal or employer for the purposes of this section."

Plaintiff sued the fraternity for violation of ORS 471.410(2) (1963)[5] and for negligence. The fraternity filed a demurrer, and the trial court granted it. *Wiener* 258 Or at 635. On appeal, this Court upheld the demurrer as to the fraternity for liability arising out of violation of ORS 471.410(2), but reversed the trial court as to the fraternity's common liability. *Wiener* 258 Or at 638. The Court held that "it was not the purpose of the statute to protect third persons from injury." *Id.* The 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...." unless the person is "severely intoxicated, or those whose behavior the host knows to be unusually affected by alcohol," *Id.* at 639 (emphasis added). The Court explained that service of alcohol to minors may give rise to liability because minors could be found by a jury to "behave in a dangerous fashion under the ifnluence [*sic*] of alcohol." *Id.*

In the same year that the Court decided *Wiener*, it decided *Stachniewicz v. Mar-Cam Corp.*, 259 Or 583, 488 P2d 436 (1971). In *Stachniewicz*, the plaintiff was injured in a bar fight involving intoxicated patrons and sued the bar on a theory of negligence *per se* based on a statute, *former* ORS 471.410(3),[6] and a

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[5] (2) No one other than the person's parent or guardian may sell, give or otherwise make available any alcoholic liquor to a person under the age of 21 years.

[6] *Renumbered at* ORS 471.410(1): "(1) A person may not sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated."

regulation, *former* Oregon Liquor Control Regulation No. 10-065(2).[7] *Id.* at 585–586. The trial court refused to instruct the jury as to negligence *per se*, stating that neither the statute nor the regulation could be the basis for negligence *per se*. *Id.* at 586. The jury returned a verdict for the defendant. *Id.* On Appeal, the Court upheld the trial court's ruling as to the statute on the basis that the standard was inappropriate as a measure of care because it failed to consider "whether a third party's injuries would have been caused, in any event, by the already intoxicated person." *Id.* The Court cited favorably to *Wiener*, identifying that the Court had already held that the service to minors statute was not an appropriate standard of law in a civil case.

In *Campbell*, the Court revisited the notion of liquor liability. In *Campbell*, two decedents were killed by a drunk driver. 279 Or at 239. The plaintiffs brought claims against the driver and the defendant bar that had served the intoxicated driver alcohol. *Id.* The plaintiff's alleged that the defendant was negligent in serving alcohol to the driver after she was "perceptibly under the influence of intoxicating liquors" and the defendant bar knew that she would drive after leaving

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[7] Which provides:

> "(2) No licensee shall permit or suffer any loud, noisy, disorderly or boisterous conduct, or any profane or abusive language, in or upon his licensed premises, or permit any visibly intoxicated person to enter or remain upon his licensed premises."

the premises. *Id*. Even though the defendants did not challenge the cause of action, the Court acknowledged that the third party claim before them had never been presented to the Court. *Id*. The Court then analyzed *Wiener*, quoting heavily to a New Jersey case, *Rappaport v. Nichols*, 31 N.J. 188, 156 A2d 1, 9 (1959):

> "Where a tavern keeper sells alcoholic beverages to a person who is visibly intoxicated or to a person he knows or should know from the circumstances to be a minor, he ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person or the minor."

Campbell adopted portions of the *Rappaport* case, holding that "a tavern keeper is negligent if, at the time of serving drinks to a customer, that customer is 'visibly' intoxicated." *Campbell,* 279 Or at 244. Ultimately, *Campbell* established the standard for liquor liability claims, for the first time employing the visibly intoxicated standard for third-party claims against taverns and bars.

In 1978, only a year after *Campbell*, the Court heard another liquor liability case, *Billy's Con-Teena,* 284 Or at 351, in which the decedent was killed when he was struck by an automobile driven by an intoxicated minor. The plaintiff brought a wrongful death claim against two taverns, each of which had sold a keg to a minor without proof of age and those minors then shared the alcohol with the eventual driver that collided with the plaintiff. *Id*. Plaintiff alleged common law negligence claims, citing *Campbell*, and negligence *per se* claims based on ORS 471.130(1) (making it unlawful to sell liquor to any person "about whom there is any reasonable doubt" that the person is a minor) and ORS 471.140 (requiring ID

for proof of age). The *Billy's Con-Teena* court ruled that while *Wiener* held that a similar statute, ORS 471.410(2) relating to minors could not be the basis for negligence, the same reasoning did not apply to ORS 471.130(1), relying almost completely on the preamble to the Oregon Liquor Control Act (OLCA), ORS chapter 471, that the act should be "'liberally construed' to 'protect the safety, welfare, health, peace and morals of the people of the state.'" *Billy's Con-Teena,* 284 Or at 356. Chief Justice Denecke authored a dissent, pointing out that both *Wiener* and *Stachniewicz* had already established that the purpose of the OLCA was not to protect injured third parties.[8]

B. Legislative Action in Response to Court Decisions Expanding Liability

Insurers responded to the liquor liability situation in Oregon by raising insurance rates. In 1978, some insurers stopped writing liquor liability insurance policies altogether and others increased their rates by up to 70% in one year. HB

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[8] The dissent was discussed favorably by Representative Lombard in the 1979 session, June 26, 1979 – 1:30 p.m. Hearing (App-22):

> "I feel, and I guess personally I concur with Justice Denecke in this case, that the whole legislative history in this area… has been towards the protections of the minors themselves and punishing the licensees by removing their licenses if they serve to minors. And I don't think the legislature has ever as a matter of policy actually addressed, and I would doubt at the time these provisions of 471.130 were enacted, ever even thought of creating third party liability in this situation…So that's why I feel that Denecke was right."

3152, House Jud. Comm., June 11, 1979 – 1:30 p.m., Hearing, Tape 85 (App-3); Exhibit B, pp. 8–10 (App-143). John Van Horn, then Legislative Chairman of the Oregon Restaurant and Beverage Association (ORBA), observed that "[t]hese sweeping court rulings have resulted in not only a flurry of lawsuits across the state, but also skyrocketing insurance costs for the licensees that can still afford liability coverage." *Id*. at (App-3). Van Horn provided several examples of taverns that had suffered severe rate hikes:

> "For example, my own liquor liability insurance for 1974-75 was $124 annually. Now, it is $952.50 and it would have been $1200 had I not changed carriers, and incidentally, since I wrote this testimony, I just renewed mine for $1500 this year.… A number of insurance companies no longer carry liquor liability insurance because of the risk. Those that do have dramatically increased the premiums to make it worth the risk. Obviously, the increased number of legal suits are a major reason for the higher premiums."

Id. Van Horn continued:

> "The problem of inadequate insurance coverage affects not only our industry but the public as well. If licensees do not carry coverage because they cannot afford it, awards to legitimate third party suits may not be fully satisfied. The insurance is to protect the public as much as to protect the licensee. ORBA has, in the past, strongly supported the concept of holding each person responsible for his or her actions."

Id. at (App-4). (emphasis added). Albert Gentner, representing the Oregon Hotel and Motel Association offered similar testimony:

> "As an example, the hotel which I specifically represent, in 1974, had no outside or separate or extra premiums for liquor liability. In 1976, there was an increasing question of third party liability, and of a total of $8,000 for liability coverage, $1000 were specifically premiums for liquor liability

> coverage, or 13%. Our present coverage of a total of $17,000 premium, $5000 is liquor liability premium, or 30%. Unless there is a specific—unless the statutes specifically spell out under what circumstances liability should be granted, I have no doubt that the coverage on my next premium will be even higher. The question of coverage of premium becomes more than just a matter of whether or not a given hotel or a given hotel chain should be required to pay higher and higher premiums. After all, the question of life or injury is certainly important, more important than a few thousand dollars. But, the same liability as it applies to a small operator who cannot afford to spend the kind of money that the Hilton hotel chains can spend, means that that operator will either go bare without any liability coverage, or will incorporate in order to have no assets in the operating company."

Id. at (App-11) (emphasis added). Diane Spies of the Oregon Federated Organizations (which included fraternal organizations throughout the state) stated in the same hearing:

> "[T]he cost of insurance is really going up at a shocking rate, and a lot of people are having to make decisions about whether they are going to insure in this area…. I will tell you, and I don't know how many people, how many carriers are still willing to insure in this state, but it's decreasing rapidly."

Id. In fact, by 1979, a major carrier, Western World Insurance Company, had stopped writing policies for liquor liability in Oregon altogether.

C. 1979 Legislature Limits Liquor Liability

In 1979, restaurants, bars, hotels, winegrowers, and other members of the hospitality industry banded together in order to respond to the rising problem of insurance rates by drafting HB 3152. At the initial committee hearing on HB 3152, John Van Horn succinctly stated the purpose of the bill:

> "Because recent Supreme Court rulings on liquor liability have gone beyond the intent of the law, we urge this legislative committee to address this issue

> through HB 3152, or any other reasonable alternative that would limit or restrict liability in both commercial and social host situations."

HB 3152, House Jud. Comm., June 11, 1979 – 1:30 p.m., Hearing, Tape 85 (App-2). Testimony akin to Van Horn's reveals that the drafters of HB 3152 were concerned with two issues: (1) reversing the effect *Billy's Con-Teena*; and (2) limiting liquor liability to claims.

1. Reversing *Billy's Con-Teena*

In order to fully appreciate the purpose of HB 3152 concerning the visible intoxication standard, it is necessary to examine the other major change made by the Legislature.

Billy's Con-Teena was a major issue for every stakeholder – restaurants, bars, hotels, wineries, fraternal orders, social organizations, and private clubs alike. The holding in *Billy's Con-Teena* completely disrupted liquor liability law in Oregon because it allowed the plaintiff to recover based on an unreasonable statutory standard provided in ORS 471.130(1), which required servers of alcohol to not serve any person "about whom there is <u>any</u> reasonable doubt" that they are not 21. Put a different way, the defendant had to present evidence that there was no reasonable doubt that a person was over the age of 21, a standard that appears to approximate or exceed the burden of proof for criminal conviction of "beyond a reasonable doubt." For this reason, "when the *Billy's Con-Teena* case came down,

carriers began dropping out of the scene altogether." HB 3152, House Jud. Comm., June 11, 1979 – 1:30 p.m., Tape 85 (App-12).

The bill drafters' reaction to *Billy's Con-Teena* was to create a uniform standard for third-party liability for service of alcohol to minors. The new statute completely overruled the holding and analysis in *Billy's Con-Teena*. In the final version of bill, Section 3 provided:

> "Notwithstanding ORS 471.130 and [the Dram Shop Statute], no licensee, permittee or social host shall be liable to third persons injured by or through persons not having reached 21 years of age who obtained alcoholic beverages from the licensee, permittee or social host unless it is demonstrated that a reasonable person would have determined that identification should have been requested or that the identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served."

(emphasis added). Thus, this section limited liability by narrowing the types of claims available to minors to a single "reasonable person" standard, closing other sources of liability whenever a suit is based on the providing of alcohol to minors. Furthermore, the legislature specifically intended that Section 3 limit and reverse the holding of *Billy's Con-Teena*. After three days of discussion as to *Billy's Con-Teena*, the Legislature ultimately adopted ORBA's amendment, which created Section 3:

> "There's no question in my mind, Representative Rutherford, that ORBA and ORA amendments, as amended by Representative Lombard, cut away to some degree from the Con-Teena decision in the present statute. In that the present statute speaks of reasonable doubt on the person's part, whereas the language here says 'a reasonable person would have determined that

> identification should have been requested.' I think that's a little bit less of a requirement on the part of the licensee to request the identification."

HB 3152, House Jud. Comm., June 28, 1979, Hearing Tape 98 (Chairman Gardner) (App-30). The Senate also had the same understanding: "Section 3 is designed specifically to back away from the case of *Davis v. Billy's Con-Teena*, as decided by the Supreme Court in 1978." HB 3152, Senate St. & Fed. Affairs and Rules Comm., June 30, 1979, Hearing, Tape 9 (Dave Dietz) (App-34).

ORBA and the hospitality industry succeeded in reversing *Billy's Con-Teena*, which at the time they feared would have dire consequences on liquor liability insurance. By preventing injured persons from suing on any grounds other than the standard set out in HB 3152, the bill drafters normalized the standard for third party liability. ORBA and the Legislature anticipated that limiting liability and retreating from *Billy's Con-Teena* would address the insurance problem:

> "I think it is clear that the agreements of the committee, if this bill passes, is that the liability situation…has gotten out of hand, creating serious problems with respect to the availability of insurance, and that the committee was doing its best to address that question by retreating somewhat from the implications of certain court decisions which have been the subject of some of the committee's discussions."

HB 3152, House Jud. Comm., June 26, 1979, Hearing, Tape 96 (Representative Frohnmayer) (App-20).

2. Limiting Liability for Visibly Intoxicated Persons

The second purpose of HB 3152 was to limit liability caused by intoxicated customers. The most extreme proposal would have changed the standard of proof to a gross negligence standard. *See* SB 323, Original Bill, Sections 74–76 (App-147). In the first set of hearings, the House Judiciary Committee debated the gross negligence standard. Chairman Frohnmayer stated that the "gross negligence standard is impossible to administer." HB 3152, June 11, 1979 – 1:30 p.m., Hearing, Tape 85 (App-9). Frohnmayer also pointed out that the grossly negligent standard would "roll back" liquor liability "into the '50s and the '40s, not just the 1970s." *Id.* (App-10). The committee then discussed the lack of certainty on the meaning of gross negligence, after which the public hearing was closed.

It was clear to ORBA after the June 11 public hearing that the legislature was not willing to impose a gross negligence standard. In the work session that immediately followed, Dave Dietz of ORBA presented a new version of the bill that removed the grossly negligent standard but still established a "pre *Billy's Con-Teena* standard of common law negligence for finding third party liability that was expressed in the *Wiener* case in 1971." HB 3152, June 26, 1979 – 1:30 p.m., Hearing, Tape 96 (App-13). (As stated above, the *Wiener* standard was service to a "severely intoxicated" person.) The final version of the bill provided that:

> "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 has served or provided the patron alcoholic beverages when such patron was visibly intoxicated."

Or Laws 1979 Ch. 801, § 1.

After Dietz's amendment, the topic of visible intoxication was not discussed again until the Senate committee hearing. In that hearing, Dietz was one of the two witnesses that appeared. He testified that HB 3152 passed the House as it was amended in committee by a 50-3 margin. HB 3152, St. & Fed. Affairs and Rules Comm., June 30, 1979 (App-33).

Dietz provided a clear, accurate, and succinct statement of what occurred in the House Judiciary Committee and what the purpose of the bill was:

> "We believe 3152 is a reasonable response to the Court's recent efforts. We believe it would bring good balance, both for protecting the rights of people that are injured, as well as protecting the ability of a licensee or permittee to conduct business in a responsible manner."

Id. at (App-34).

The bill, very simply, protected licensees, permittees, and social hosts in sections 1 and 2 of the measure, and indicated that a licensee, a permittee, or social host would only be liable for damages incurred or caused by an intoxicated patron or guest in the event that beverages were provided to a visibly intoxicated patron or guest. The Senate committee passed the bill on without any amendment and the bill passed the Senate by a 21-8 margin. House and Senate Calendar, Sixtieth Legislative Assembly, HB 3152 (App-146).

ORBA and the Legislature intended that the bill would return Oregon to the standard in *Wiener* and *Campbell*. The *Chartrand* opinion mistakenly assumed that because the gross negligence standard was removed, "the purpose of the bill changed from restricting liability to expanding liability to third persons." 298 Or at 697. As Section 1 of the final bill clearly states, there can be no liability unless visible intoxication is first proven. At a minimum, this provision maintained the status quo for third-party liquor liability. But, in fact, it did more than that – it placed a limit on the type of claims that can be made. The visible intoxication requirement standardized claims to achieve the same result as the changes to third-party liability for service of minors—addressing the problems that occur when available and affordable liability insurance does not exist.

3. Statutory Right of Action Would Undercut Legislative Intent

It is clear from the analysis above that the legislature acknowledged that the insurance problem had "gotten out of hand." HB 3152, House Jud. Comm., June 29, 1979, Hearing, Tape 96 (Representative Frohnmayer) (App-20). From beginning to end, the purpose of the bill was to "limit the scope of third party liability, to actions which could reasonably be expected to be controlled by a licensee or private host" in order to address the growing liquor liability insurance problem. HB 3152, House Jud. Comm., June 11, 1979, Hearing (Albert Gentner,

Oregon Hotel and Motel Association) (App-10). The Legislature intended to balance the interests of plaintiffs and restaurants, bars, hotels, clubs, and any other server of alcohol. The Dram Shop Statute did not need to create liability because third party liability already existed prior to its enactment. If the Dram Shop Act was to have any effect on insurance rates, it had to have the effect of actually limiting or narrowing the scope of third party liability for restaurants and bars.

The creation of a statutory tort that would do nothing to limit existing negligence claims would have only compounded the problems that Oregon was already facing. Moreover, the creation of a statutory tort with limits, but eliminating foreseeability, would ignore an important element of a common law liquor liability claim—which would also go against the purpose of the law. In short, the Dram Shop Statute limited liability for claims already existing at the time—no other result is tenable in light of the underlying legislative purpose of making insurance available for the benefit of plaintiffs and businesses alike.

III. ARGUMENTS FOR STATUTORY LIABILITY BASED ON CHARTRAND ANALYSIS MUST BE RECONSIDERED

The Court of Appeals' decision correctly identified that in order for a statute to give rise to liability, it is necessary to examine the legislative history in addition to the text and context of the statute. *Deckard*, 267 Or at 658. Rather than independently review the legislative history, the *Deckard* court relied entirely on

Chartrand for a summary of that court's version of legislative history. For reasons already discussed and continuing below, *Chartrand*'s conclusions and analysis were wrong. The *Deckard* court's reliance on *Chartrand* was based, in part, on the fact that it has been cited favorably for years by this Court outside of the context of liquor liability. *See, e.g., Doyle v. City of Medford,* 356 Or 336, 345, 337 P3d 797 (2014) (citing to *Chartrand* for proper analysis of statutory liability claim); *Scovill v. City of Astoria,* 324 Or 159, 172, 921 P2d 1312 (1996) (referring to *Chartrand* in a list of cases in which courts properly found that a statute created statutory liability); *Bellikka v. Green,* 306 Or 630, 634–35 (1988) (citing to *Chartrand* for the proposition that "[t]his court has recognized that there are instances where the legislature has, in effect, created a tort"); *Nelson v. Lane County*, 304 Or 97, 107, 743 P2d 692 (1987) (summarizing that *Chartrand* "recognize[ed] tort recovery under statute implicitly creating civil liability of tavern owner for injuries caused by visibly intoxicated patrons). It is for this reason that the *Deckard* Court did not analyze *Chartrand* or take the time to examine the Dram Shop Statute and each amendment thereafter.

Simply put, *Chartrand* is factually, legally, and logically incorrect. No amount of favorable citation can repair the mistakes that the *Chartrand* Court made. Upon review of available documents, there is not a single case that has attempted to determine if the *dicta* in *Chartrand* is supported by the legislative

history. With the transcript of the House and Senate hearings, the Court has before it more legislative history than any other court that has considered the Dram Shop Statute. The history starts in 1979, but does not end there. To obtain a full review, the Court must include the 1987 session (which was unavailable to the *Chartrand* Court), plus the 1997 and 2001 legislative sessions.

The statutory liability analysis of *Chartrand* arose out of written questions posed by the Court, so the parties did not have a full opportunity to litigate or brief the issue. 298 Or at 695. The resulting analysis was consequently cursory at best. The Court erred in three major ways: (1) failing to analyze the legislative history of HB 3152 in determining that it created statutory liability; (2) incorrectly stating that violation of the OLCA (ORS chapter 471) could be the basis for a negligence *per se* claim; and (3) poor legal analysis of Oregon and out of state case law.

A. Failure to Analyze Any Legislative History Documents

Chartrand completely failed to analyze the substance of HB 3152. As we have pointed out, it is likely that the Court did not have access to the legislative history because the issue of statutory liability was not raised on appeal, nor briefed by the parties. The Court may not even have reviewed the minutes of the hearings given that it did not cite once to primary legislative sources. *See Id.* at 696. Instead, the Court relied on a law review student comment that reviewed HB 3152. *See* Comment, *Review of Oregon Legislation*, 16 Willamette L. Rev. 191, 192-93

(1979) (App-165); *see also, Chartrand*, 298 Or at 697. Regardless of the fact that the author of the comment was a third-year law student, its conclusions and analysis regarding the effect and purpose of the bill are completely incorrect. *See Id.* at 192 (App-166). In the article's introductory paragraphs, the author writes, "Chapter 801 now provides the exclusive standard for host liability in civil action. The standards expand the liability of commercial and social hosts beyond present case law limits." *Id.* (App-166). As discussed above, this conclusion is false. To support her proposition, the author cited to a statement by Representative Rutherford in the June 28, 1979 hearings. *Id.* at 192, n.10 (App-166). However, a review of the hearings reveals that Rep. Rutherford did not make any statement even approximating the author's statement.

A review of the remaining article and scrutiny of its citations shows that the article is replete with statements that are unsupported by the facts. The *Chartrand* court relied principally on one line especially, "[a]fter numerous amendments by the House Judiciary Committee, the bill lost its liability reducing impact, yet retained the support of commercial hosts." Comment at 192 (App-166). As has been thoroughly set out in this brief, HB 3152 had the opposite effect on liquor liability claims. ORBA and the restaurant industry supported the bill to the end because it limited liability—contrary to the author's observations, the bill supporters did not simply watch the bill get hijacked and then further expand

liability. The bill drafters, the legislators, and even the bill opponents, OTLA, recognized that HB 3152 limited liability.

When the bill had reached its final form, Clayton Patrick, representing OTLA (i.e. the plaintiff's bar), stated that "we're obviously certainly not going to support the bill as a whole, but I guess I would prefer [the version of] Representative Rutherford." HB 3152, House Jud. Comm., June 28, 1979, Hearing, Tape 98 (App-31).[9] When Patrick was asked what amendments he would make to the bill, he stated:

> "Section 3 (visibly intoxicated person standard) impliedly deletes minors because it says there shall only be liability if there was serving of alcohol…to a guest who was visibly intoxicated. That's one limitation, and then the other limitation on minors is in the amendment ORS 471.130, which is section 5. That would have to be deleted and language inserted in sections 2 and 3 which clearly indicated that minors were included."

HB 3152, House Jud. Comm., June 26, 1979 – 1:30 p.m., Tape 96 (App-16) (emphasis added.). An exchange between Patrick and Representative Rutherford[10] further demonstrates that they recognized that visible intoxication limited liability, even without the minor statute:

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[9] As first presented, HB 3152 contained section 5 (*see* App-186). After several amendments to the bill, including those mentioned above, section 5 became section 3 according to amendments in the House Judiciary Committe. (App-180–84).

[10] Representative Rutherford's testimony reveals a marked leaning toward OTLA. For example, he proposed amendments that would have codified *Billy's Con-Teena*. HB 3152, House Jud. Comm., June 26, 1979 – 1:30 p.m., Tape 96 (App-22–23) (moving to delete section 5, which addressed third liability for providing alcohol to minors).

> Clayton Patrick: [I]f you read section 2 as it currently stands, it says no licensee is liable for damages incurred or caused by intoxicated patrons off the licensee's business premises unless the licensee has served or provided the patron alcoholic beverages when such patron was visibly intoxicated. What that means to me is, if you, for example, if 7/11 store and a minor comes in and you know that person is a minor and you sell him a case of beer anyway and they go out and get drunk and kill somebody, you did not serve that patron alcoholic beverages when the patron was visibly intoxicated, there wouldn't be any liability, the way I read section 2.
>
> Representative Rutherford: Is section 5 [which stated that a licensee has no third-party liability for failing to ask for identification] redundant, in your opinion?
>
> Clayton Patrick: Yeah, I think so. If the—if that's what you want to do, is to have absolutely no liability for any conduct respecting minors and alcoholic beverages, which I think is not something you want to do.

Id. at (App-21). Representative Rutherford then moved to delete section 5, the section that was intended to (and ultimately did) reverse *Billy's Con-Teena*:

> I move to delete section 5, so it will leave the case law basically as it is at the present time, mainly that you would be responsible for serving a minor, except as it's modified by sections 2 and 3, which provides that no licensee is liable for damages incurred unless they have served someone who is visibly intoxicated. The result being that it would be responsible for serving a minor if that minor is visibly intoxicated.

Id. at (App-23). It is apparent that supporters and opponents of bill all realized that the visibly intoxicated person standard was a limitation on liability.

The *dicta* in *Chartrand* was based almost entirely on the 3L's law review comment's analysis. *See Chartrand*, 298 Or at 697. After quoting the law review comment, the Court concluded, "[d]eletion of the gross negligence standard left the final version of the bill with two sections that provide for host liability for all

damages caused or incurred off-premises by an intoxicated person…[t]he risk, the harm and the potential plaintiff were all foreseen by the lawmaker." *Id.* The only basis the Court had for making its conclusion that the Dram Shop Statute creates liability was the law review comment. The law review comment was incorrect because it misstated the intent and effect of HB 3152. Therefore, the conclusion by the Court in *Chartrand* was based on incorrect conclusions and analysis.

B. *Chartrand* Analysis of Negligence *Per Se* Claim Flawed

The *Chartrand* Court incorrectly stated that a liquor liability claim alleging negligence *per se* based on ORS chapter 471 was a viable cause of action. *Chartrand*, 298 Or at 696. The Court failed to identify that *Billy's Con-Teena* was superseded by HB 3152. HB 3152, House Comm. on Judiciary, June 28, 1979, Tape 98, Side 1 (App-30) (Representative Lombard and Chairman Gardner stating that the purpose of the bill was to "cut away" from *Billy's Con-Teena*); *see also*, *Smith v. Harms*, 125 Or App 494, 498, n. 4, 865 P2d 486 (1993) (stating that the Dram Shop Statute limited *Davis* in order to protect servers of alcohol from liability). The fact that the *Chartrand* Court was unaware that one of the major and explicit purposes of HB 3152 was to reject the holding in *Billy's Con-Teena* casts considerable doubt as to its understanding of the bill at all. Furthermore, prior case law had already expressly held that the OLCA could not be the basis for a negligence per se action. *Wiener*, 258 Or at 638 ("it was not the purpose of the

statute to protect third persons from injury"); *Stachniewicz,* 259 Or 587 ("a violation of the statute should not constitute negligence as a matter of law in a civil action for damages against its violator"). The complete lack of awareness of these prior cases demonstrates further that the *dicta* in *Chartrand* was incorrect.

C. *Chartrand*'s Conclusions Based on Poor Legal Analysis

Chartrand's legal analysis was flawed in its case law analysis. The first example of *Chartrand*'s mistakes is that it completely mis-cited *Sager v. McClenden*, 296 Or 33, 672 P2d 697 (1983). *Sager* was the first case after creation of the Dram Shop Statute to examine the legislative history behind the law. After reviewing the legislative history, the *Sager* Court concluded 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 (emphasis added). Despite this crystal-clear statement that the Dram Shop Statute limited liability, the *Chartrand* Court cited to *Sager* for the proposition that "the purpose of the bill changed from restricting liability to expanding liability to third persons, but not to the person served." *Chartrand*, 298 Or at 697. Nothing in *Sager* suggests that the Dram Shop Statute did anything other than limit liability.

The *Chartrand* Court completely failed to follow the analysis in *Sager*, yet cited it as the controlling law. *Chartrand* did not distinguish its analysis from that of *Sager*, including the following important statement of legislative intent:

> "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."

Sager, 296 Or at 39.

Moreover, the *Sager* Court adopted the reasoning of the dissenting opinion of Presiding Judge William Richardson in Court of Appeals. *Sager*, 296 Or at 39. In his dissent, Judge Richardson eviscerated the reasoning of the majority that the Dram Shop Statute gave rise to statutory liability:

> "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 v. McClenden, 59 Or App 157, 162–165 (1982) (dissent) (emphasis added). Because the *Chartrand* Court failed to explain or distinguish its holding from the completely opposite holdings in *Sager*, it is clear that its analysis was lacking.

The other major error the Court made was to rely on out-of-state case law that was based on a liquor liability scheme that was completely distinct from Oregon's. In footnote 5, following its analysis of statutory liability, the Court relied on yet another law review comment. *See* Comment, *Liquor Vendor Liability for Torts of Intoxicated Patrons*, 12 U. Balt. L. Rev. 139, 142 (1982). The *Chartrand* Court completely failed to analyze this commentary on the law or explain why it applied to the Dram Shop Statute but nonetheless concluded based on the comment that "a plaintiff protected by such a statute need not resort to any concepts of negligence." *Chartrand*, 298 Or at 696. That failure to analyze the applicability of the law review comment is important here because Oregon's Dram Shop Statue is distinct from many other states in that it does not explicitly create a right of action. For example, the statute in *Healey v. Cady*, 104 Vt 463, 466, 161 A 151, 152 (1932) , the Vermont case cited in the comment, creates a right of action for third parties:

> "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." .

Former 1917 G.L. § 6579 (emphasis added). Commenting on the law the Vermont Supreme Court stated that its statute "created a remedy for wrong where there was none before." *Healey* 104 Vt. at 463. Unlike Vermont, there was already a remedy at common law for injured third parties against bars and restaurants for serving visibly intoxicated persons. *Campbell,* 279 Or at 243–244. Because *Chartrand*'s reliance on foreign case law was inapposite to the discussion of whether the Dram Shop Statute created liability, its conclusion that it created liability has no basis.

D. Subsequent Case Law Inconsistent with *Chartrand*

This Court has never reaffirmed *Chartrand*, and the Court's analysis of the Dram Shop Statute legislative history in subsequent cases directly contradict *Chartrand*.

In 1986, three years after *Chartrand,* the Court revisited the legislative history of the Dram Shop Statute in order to determine whether it gives rise to a statutory tort. *Hawkins v. Conklin*, 307 Or 262, 767 P2d 66 (1988). Relying on the text of the statute and minutes of hearings on HB 3152 the *Hawkins* Court concluded:

> "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*, 296 Or at 37-39 (emphasis added). Although the claims in *Hawkins* involved violence, its conclusion and analysis do not distinguish between the two types of claims. *Hawkins* highlights the fact that the *Chartrand* Court failed to identify a particular class of persons that the Dram Shop Statute was intended to protect. *See Chartrand*, 298 Or at 697. The key to the statute was to limit liability of alcohol servers so they could obtain affordable insurance—which would be available for successful plaintiffs. Nonetheless, the *Chartrand* Court stated that the Dram Shop Statute had the effect of "expanding liability to third persons." *Id.*

IV. SUBSEQUENT AMENDMENTS TO THE DRAM SHOP STATUTE LIMIT LIABILITY

Since its enactment, the Dram Shop Statute has been amended three times. In 1987, the Legislature passed SB 323, which raised the plaintiff's burden of proof for visible intoxication to "clear and convincing evidence" and required police to give notice to a bar, restaurant, or other provider of alcohol that is implicated in an alcohol-related incident. Or Laws 1987 Ch 774. In 1997, the

hospitality industry once again convinced the Legislature to limit liability through SB 601, which imposed tort notice similar to the Oregon Tort Claims Act ("OTCA"). Or Laws 1997 Ch 841; *See* ORS 30.275. Most recently, in 2001, the Legislature passed SB 925, which explicitly reversed the effect of two Supreme Court cases by requiring plaintiffs to prove by clear and convincing evidence that they did not substantially contribute to the intoxication of the person that caused them injury. Or Laws 2001, Ch 534.

Examination of the legislative history reveals a pattern significant to this discussion. Beginning with HB 3152, legislation relating to the Dram Shop Statute has accomplished two purposes. The most prominent purpose of Dram Shop legislation has been to ensure that liquor liability insurance is available and affordable for the benefit of plaintiffs and businesses alike. The second purpose of the Dram Shop Statute has been to "overrule" case law that would otherwise create significant additional liability for alcohol providers. Furthermore, analysis of each amendment to the Dram Shop Statute contradicts the *Deckard* analysis and demonstrates that the Legislature has never intended, let alone contemplated, that the Dram Shop Statute creates statutory liability.

A. 1987 Legislature Significantly Limits Liability in Remedying Crisis-Level Liquor Liability Insurance Shortage

Despite the hopes of proponents of HB 3152, that the Dram Shop Statute would limit claims and result in increased insurance availability, it was abundantly clear by 1987 that that was not the case. Hank Crawford, who was heavily involved with HB 3152 testified before the Senate Judiciary Committee, "I was a participant in the modification of the dram shop laws when they went through, and I certainly would agree with you" that there was a "difference between what everyone thought they had done [in 1979] and what everyone turned out to do in the courts." SB 323, Senate Jud. Comm., February 4, 1987 (App-71) (as discussed later, Crawford was referring to new lawsuits and claims). In fact, by 1987, there were only two carriers of liquor liability in the state that only occasionally provided coverage. *Id*. at (App-38). Oregon was facing an insurance crisis that spurred a host of legislation, culminating in a huge SB 323, which addressed insurance regulation and tort reform, including amendments to the Dram Shop Statute. Bill Cross, one of the drafters of the liquor liability amendments and a representative of ORBA, opened the committee hearings on liquor liability by explaining the dire circumstances that the industry faced:

> "We too are victims as many other businesses are with respect to the general liability insurance coverage. We've experienced some fairly significant rate increases in that area, but in particular, the problems that have been posed by the insurance, the liquor liability insurance, have reached crisis proportions

> for our industry. Nationally, liquor liability insurance is the second most difficult coverage to obtain, after pollution risk. In some areas of the country, it's virtually impossible to obtain coverage. Oregon is one of those states, for certain types of licensees. Last session, we reported to you that approximately one out of every two licensees in the state of Oregon was not able to either obtain or maintain insurance coverage on liquor liability. This session, we estimate it's one in four licensees."

SB 323, Senate Jud. Comm., January 21, 1987, Hearing, Tape 4A (App-39). Cross continued:

> "The reason one out of four licensees—three out of four licensees does not have coverage anymore, is in part 50% of the licensees simply cannot get coverage, because most carriers that are still offering coverage in the state have underwritten it in a manner that if you're doing more than 25-35% of your gross sales in alcoholic beverages, then they're not going to offer you the coverage."

Id. at (App-38).

Hank Crawford, another contributor to SB 323 and a representative of the Oregon Restaurant and Hospitality Association, observed that victims of drunk drivers were also suffering:

> "It's really frightening, I think, as a citizen, and certainly it must be as a legislature, to recognize that whatever the reason—whether it be that you are not offered any insurance, or that you can't afford it—that the public is being laid bare of any chance of recuperating any costs from a liability claim."

Id. at (App-40). Bob Rice, a Portland restaurateur (who later served a four-year term as OLCC chairman), was significantly impacted by the liquor liability insurance problem. As rates rose and carriers fled Oregon, Mr. Rice was forced to purchase a policy with an unadmitted insurance company that vanished when one of his restaurants was sued for liquor liability. He was forced to defend the suit out

of pocket despite the fact that he had been paying premiums on a policy that insured him for more than a million dollars for liquor liability. After explaining his personal situation he testified:

> "I'm appearing on behalf of the ORBA, but if I could make an appeal to you from the standpoint of where everyone is: in the state of Oregon, dram shop liquor liability is not working, and it's not working for anyone. If the purpose of liquor liability—excuse me—is to punish, perhaps it's doing that. If the purpose is prevention, I think it is demonstrably not doing that. If the purpose—which I would say is the most noble purpose—is compensation of victims, it is failing miserably in that regard."

SB 323, Senate Jud. Comm., February 4, 1987, Hearing, Tape 17, Side A (App-59). While Rice's business was able survive his liquor liability suit, most businesses would not, as expressed by Hank Crawford, "What we're most concerned about—and I suspect each of you are aware of some of the things I'm going to say, so I will not dwell on them—is that the restaurant business itself is a very precarious business." SB 323, Senate Jud. Comm., January 21, 1987, Hearing, Tape 4A, (App-40).

The hospitality industry also presented testimony from an insurance agent, Joe Phillippay, who explained in detail the reasons behind Oregon's high liquor liability insurance rates. *Id.* at (App-52–64). Phillippay explained that the biggest problem facing Oregon was that "[l]icensees and permittees are faced with very limited markets to secure the coverage." *Id.* at (App-53). He further stated that Oregon had a very high risk factor, especially in comparison to its premium base.

Id. at (App-64). In fact, Oregon reported the fifth highest lost ratio (142%) for liquor liability between 1980 and 1983. *Id*. at (App-74). Insurance companies were bleeding money, which forced all but two of them out of business in Oregon. The only insurers that remained were unstable and only wrote policies in Oregon to "restaurant-oriented operations, those with a relatively low percentage of liquor sales" but that "there is nobody outstanding who insurance brokers go to as a ready market for liquor liability for restaurants, so its' still limited, even for those people." *Id*. at (App-55)

Chairman Bill Frye asked Phillippay how the insurance companies evaluated risk from state to state, and he responded that insurance companies evaluate "the various statutes that do exist in the states, along with the case law and the loss experience, and they categorize the states as they see fit." *Id*. at (App-56). Senators questioning Phillippay asked whether rising liquor liability insurance premiums were simply the result of insurance generally. Phillippay responded, "I don't think the problem we're having with liquor liability availability in Oregon is necessarily a by-product of the hard insurance market. Frankly, liquor liability coverage, even in the good times for insurance companies, is kind of a stepchild coverage." *Id*. at (App-64).

Carol Satterfield, representing MADD, testified in favor limitations on liability to the benefit of injured plaintiffs and the hospitality industry alike:

> "One of the questions that we asked our victims was why did you file a lawsuit against the licensed establishment? And much to my surprise, the answer given most often was, because I was injured by an uninsured drunk driver…
>
> * * *
>
> Now, MADD believes, just as the hospitality industry does, that a greater financial burden should be held or whatever, borne, I guess, by the drunk driver. But when that drunk driver is uninsured, where else can the victim go? And I want you to remember that when we're talking about dram shop, liquor liability, we're only talking about those instances in which a licensed establishment has broken the law by selling to a visibly intoxicated person, or has broken the law by selling alcohol to a minor.

SB 323, Senate Jud. Comm., January 21, 1987, Tape 4A (App-46). Satterfield's testimony raises an important point about liquor liability, which is that most drunk driving accidents are covered by the drivers own insurance. Plaintiffs only bring liquor liability claims when it is clear that they will not recover for the full extent of their injuries from the driver, which often involve more serious injuries. Thus, the vast majority of claims made against alcohol providers are claims for significant injuries, meaning that for insurance to be available and affordable—legislative action to place limits on Dram Shop lawsuits must be enforced to have any meaning.

It is clear that the legislators understood that there was a liquor liability insurance crisis:

> "Liquor liability, as you all know, there's a—it's been an issue up every session that I can recall since being around the process. Many bills in this session. It has a very direct impact in Oregon's system right now…"

SB 323, Joint Conf. Comm., June 22, 1987, Hearing, Tape 4A, (Representative Phillips) (App-104). They also understood how the Dram Shop Statute worked:

> "The legislature repealed the dram shop law in Oregon about ten years ago, but the liquor liability law in Oregon prefaces all your liability on the fact that you've got to be found by a preponderance of the evidence, to have served a visibly intoxicated patron….That's the underlying key to the whole thing, and working from there now, you can suggest that that shouldn't be the law in Oregon, but I don't think that I want people to come to the legislature and listen to this committee deliberate and listen to witnesses and think for one minute that we got a law in Oregon that makes them responsible for anything less than serving a visibly intoxicated patron, because that is the law."

SB 323, Senate Jud. Comm., February 4, 1987, Hearing, Tape 17, Side A (App-71) (emphasis added).

The 1987 Legislature was fully aware of the impact that insurance was having on the citizens of Oregon—especially small business owners and victims of drunk drivers. The Legislature passed SB 323 to address that precise issue, once again by limiting liability.

In immediate response to the insurance crisis, ORBA again drafted a bill that was targeted at reducing insurance risks by limiting liquor liability claims. As part of SB 323, ORBA and other supporters wrote language that would require plaintiffs to prove by clear and convincing evidence that the intoxicated person that injured them was served while visibly intoxicated. SB 323, Original Bill (App-

147); HB 3368[11], House Jud. Com., Sub. 1, May 14, 1987, Hearing, Tape 569, Side A (App-79). Representative Springer observed:

> "Now, it appears you also have increased the burden of proof, which generally applies to all civil cases, which is a preponderance of evidence. You've changed that burden of proof from a preponderance of truth to a clear and convincing evidence. That the patron or guest was served alcoholic beverages while visibly intoxicated."

Id. Rep. Springer followed up, asking, "[w]hat impact do you expect that's going to have on the number of cases filed and the number of cases successfully prosecuted?" Bill Cross of ORBA responded:

> "I would presume it would have some impact on the number of cases filed. It would certainly make some of the prosecutions, or at least some of the successful prosecutions that we've seen in the past more difficult to obtain from juries, in that the clear and convincing would require evidence of a stronger case, or more direct evidence, of actual service to a visibly intoxicated person."

Id. There was ample testimony before the Legislature that a higher standard of proof would decrease liquor liability claims and thereby reduce the risks for insurance carriers. Chairman Frye observed that raising the standard of proof to clear and convincing evidence was "more than just a minor departure from existing law" and that the standard would "help the licensee better defend against these things because it would require more proof."

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[11] The amendments were brought up in a related bill, HB 3368, which explored options for liquor liability insurance, including a publicly-created insurance pool. The liquor liability amendments were re-inserted into SB 323 in the House after the hearing of HB 3368.

Ultimately, adding the requirement of the clear and convincing evidence standard was the lynchpin of SB 323. In the words of one of the carriers of the bill, Representative Phillips, "the number one priority for me [is the] clear and convincing evidence issue."

The policy the Legislature chose was to impose the highest civil standard of proof on plaintiffs that bring liquor liability claims in order to alleviate the problem of liquor liability insurance unavailability.

B. Oregon Supreme Court Reaffirms that No Statutory Tort Exists for Liquor Liability Claims

Shortly after the passage of SB 323, this Court resolved some important liquor liability issues. Most importantly, in *Gattman*, this Court considered whether the Dram Shop Statute created a statutory tort in favor of third parties that are injured as a result of the violent acts of an intoxicated person. 306 Or at 13. In *Gattman*, the assailant, after being served while visibly intoxicated, left the premises and stabbed the plaintiff. *Id.* The plaintiff sued the defendant tavern, alleging negligence and statutory liability. *Id.* at 14. Upon a motion to dismiss for failure to state a claim, the trial court dismissed the statutory liability claims. *Id.* In an opinion by Chief Justice Peterson, the Supreme Court held that the Dram Shop Statute does not create a statutory tort against taverns in favor of persons injured by the violent acts of an intoxicated person. *Id.* at 24. In reaching its

decision, the Court relied heavily on the Court's analysis in *Sager*, which "held that no statutory tort action in favor of intoxicated persons was created." *Id.* at 20–23. In a footnote, the Court observed, "Moreover, it is unusual to create a statutory tort with language that 'no person is liable unless.'" *Id.* at 23, n.11.

Nonetheless, the Court engaged in a statutory tort analysis, distinguishing its case from *Chartrand* as discussed above. *Gattman*, 306 Or at 24. The Court stated that "[t]his plaintiff is not within the class of persons intended to be protected by the statute and the harm is not of a type intended to be protected against. The entire legislative history is in terms of the protection of persons injured by inebriated motorists." *Id.* First, this is not true. This statement is incorrect and/or incomplete. At best, it can be said it was to limit liability of restaurants and bars so that insurance was available and affordable—which would allow plaintiffs that can meet the conditions placed on a negligence claim to recover their damages.

C. Tort Claims Notice Keeps Insurance Affordable

In 1997, the Oregon Restaurant Association (formerly ORBA) presented SB 601. Two years earlier, the OLCC had started requiring licensees to procure insurance or post a bond of at least $300,000. In light of that significant change, the hospitality industry was again concerned with making "insurance affordable and available" in order to make the insurance requirement manageable. SB 601, House Jud. Civil Law Sub., May 14, 1997, Tape 96A (App-121). In 1997, the

insurance situation was not nearly as dire as it was 1979 or 1987. Bill proponents presented no evidence of a lack of insurers because the OLCC had already created a market for insurance by making it mandatory. The bulk of the evidence from the committee hearings was that tavern owners had a disproportionate amount of liability in relation to their fault under the current law. *Id*. In order to remedy that problem, the bill proponents sought to tip the scales further toward restaurants, bars, and hotels by requiring notice akin to the OTCA. SB 601, Senate Bus., Law & Gov. Sub., April 1, 1997, Tape 128, side A (App-112) (Mike Mills); SB 601 A-Engrossed (App-148). During committee hearings, the Oregon Restaurant Association also added a significant provision that would extend the OLCC's $300,000 mandatory insurance rule to all new and renewing licensees. SB 601, House Jud. Civil Law Sub., June 2, 1997, Tape 96A (Mike McCallum) (App-122). The legislative history behind SB 601 demonstrates that the Legislature's policy of limiting liability remained unchanged.

Several groups, including MADD, submitted written testimony opposing SB 601. SB 601, Senate Bus., Law & Gov. Sub., April 1, 1997, Exhibit B (App-150); SB 601, House Jud. Civil Law Sub., June 2, 1997, Exhibit D (App-157). MADD stated that SB 601 "would provide immunity to some irresponsible taverns, restaurants, and bars who have violated Oregon law." Peter Glazer, representing the Governor's Advisory Committee on DUII wrote that "The proposed

amendment to ORS 30.950 would have the effect of immunizing some irresponsible liquor servers." Judy Hudson, writing in opposition, precisely sums up what the opposition perceived was the purpose and effect of SB 601:

> "This bill will prevent, in most cases, the injured party from bringing a Dram Shop Claim…The only justification for this bill is to limit liability, and who benefits? those [sic] bars and restaurants who fail to follow Oregon law and continue to serve visibly intoxicated persons."

Exhibit B (App-152) The opposition testimony reveals two important facts. First, it was commonly understood (contrary to Mike Mills' testimony) that the notice provisions limited liability for tavern and restaurant owners. Second, the wide opposition to SB 601 reveals that even opponents of liquor liability limitation understood that the limitations of the Dram Shop Statute applied to all claims, not just to "statutory claims," if such a claim exists. Why else would heavy-hitters like MADD, the OSB, the gubernatorial DUII task force, and OTLA put up such a fight if the changes to the Dram Shop Statute only applied to "statutory claims"?

The abundance of testimony before the Legislature in SB 601 demonstrates that the Legislature knew that the notice provisions would limit common law negligence claims, thereby immunizing some taverns and restaurants from liability. The Legislature was aware that opponents to SB 601 felt that requiring notice was "bad policy," and still it passed SB 601 into law, granting taverns the same restriction that is afforded the state government against tort claims. There can be

no argument that the Legislature's intent was undoubtedly to limit liquor liability claims in order to keep insurance "affordable and available."

D. 2001 Amendments Reign in Judicial Interpretation

The legislative history of SB 925 demonstrates that each time liquor liability has been expanded, the Legislature has responded by limiting liability at the request of the hospitality industry. SB 925 set out to remedy the effect of *Grady v. Cedar Side Inn, Inc.*, 330 Or 42, 997 P2d 197 (2000) (holding that passenger who contributed to drunk driver's intoxication and later caused passenger injuries allowed to bring liquor liability claim) and *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 9 P3d 710 (2000) (holding that liquor liability claim available to intoxicated patron that was injured as a result of falling while intoxicated). In the ORA's letter to the Legislature, Mike Mills presented the holdings of *Grady* and *Fulmer* and urged the Legislature to specifically overrule those cases and express its intent to allow only claims of innocent third parties. SB 925, House Jud. Civil Law Sub., May 14, 2001, Hearing, Tape 94, side A (App-139–140) (App- (Bill Perry, Oregon Restaurant Association) (App-; Exhibit E (App-159). Mills also suggested that the Legislature could distinguish "between on premise and off premise injuries to an intoxicated person" as well as between "a person who actually purchases intoxicating beverages for a person and one who 'encourages' such intoxication." *Id.* (App-164). The final version of the

complicity and contribution provisions demonstrates that the Legislature followed Mills' suggestions almost to the letter.

The Legislature chose to completely bar all liquor liability claims by those who are injured as a result of their own intoxication. The Legislature also limited claims brought by persons who provided alcohol or contributed to the intoxication of the person that injured them; however, the Legislature chose to shift the burden onto plaintiffs to prove that they were not complicit in the intoxication of the person that caused them injury. The Dram Shop Statute started in 1979 with the hospitality industry responding to case law that significantly impacted the survival of their business. In 2001, the Legislature came full circle and responded decisively to *Grady* and *Fulmer* by reversing the holdings of each of those cases.

V. CONCLUSION

As an attorney that specializes in liquor liability claims, it is apparent that the law needs clarification. Due to the confusion in the law, insurance carriers are unable to accurately assess risk and either raise rates or leave the state completely. During my career, I have noticed a pattern in the liquor liability insurance industry. Excess and surplus insurance companies will write a number of policies in Oregon for the "neighborhood" bar/tavern and larger businesses before they realize that they are inundated with claims and eventually leave the

state within two to three years. This cycle repeats itself. While we are not faced with the dire circumstances of 1987, insurance problems persist.

Those insurers that are aware of the lack of clarity of the law adjust for that risk by raising prices, refusing to write the risk in Oregon, or they simply leave the state. OLCC licensees should not be subject to the uncertainty of availability and affordability of insurance from year to year, which currently is the status quo. But for the mandatory insurance requirement, there would be an unstable market at best. The Legislature has continually demonstrated its intent to limit all liquor liability claims, yet confusion remains as to what claims exist and whether this Court will enforce the limits stated in the Dram Shop Statute. It is time for that uncertainty to be put rest by ruling once and for all that the Dram Shop Statute does not give rise to a "statutory tort."

If the Court concludes that ORS 471.565 does create a statutory tort, it will do little to resolve the confusion that is Oregon liquor liability law. If ORS 471.565 does create a statutory tort, then how could the limitations apply to negligence claims if the Legislature intended the Dram Shop Statute to create a right of action? Why would the Legislature do that? How can this be reconciled with legislative history?

If the Court rules that the limitations do not apply to claims other than a statutory tort or leave the question unanswered, liquor liability law will be thrown

into disarray. All of my pending liquor liability cases allege negligence. Pleadings have been modified to meet the confines of ORS 471.565 through motion practice or by agreement with opposing counsel. In several cases, motions based on the limitations of ORS 471.565 have been filed. Without guidance as to whether the limitations apply, plaintiff's attorneys will argue that they don't have to follow the limits of the Dram Shop Statute for negligence claims.

As a practical matter, if a statutory tort does exist and it negligence claims are not bound by ORS 471.565, the statutory tort will become a nullity. With all of the limitations that come with ORS 471.565 (tort claims notice, immunity for voluntary intoxication, clear and convincing evidence, substantial contribution), a negligence claim (which would presumably return to a *Campbell* standard) would obviously be much easier to prove. Moreover, if the Court rules that there is a statutory tort and the limitations apply to negligence claims, then it will effectively make the statutory claim the preferred cause of action because the claims would be identical but for the necessary element of foreseeability in negligence claims. Such a result cannot be reconciled with the intent of the Legislature. If the Dram Shop Statute is a codification of the common law, then the creation of a statutory tort would make the claim easier to prove because foreseeability is often an important issue in liquor liability cases. Likewise, because the intent of each legislature was to limit liquor liability or to bring the

law back in line with legislative intent, it would be inapposite to create a cause of action that actually made a claim easier to prove. Liquor liability insurance risks in Oregon are already unpredictable. This Court has the opportunity to provide clarity.

Respectfully submitted,

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Certificate of Compliance with Brief Length and Type Size Requirements

I certify that this brief complies with the word limit of 14,000 words for opening briefs pursuant to ORAP 5.05(B)(i)(a), and that the word count of this brief is 12715 words as described by ORAP 5.05(2)(a). I also 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)(g).

/s/ Jeffrey D. Eberhard

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Jeffrey D. Eberhard

CERTIFICATE OF FILING AND SERVICE

I certify that I filed the attached **BRIEF ON THE MERITS OF *AMICUS CURIAE*** 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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