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

MERITS BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION

Appeal from the Final Judgment of the Circuit Court for Lincoln County
dated June 12, 2012
Honorable Charles P. Littlehales, Judge

Review of the Decision of the Oregon Court of Appeals
Opinion Filed: November 19, 2014
Author: De Vore, J.
Concurring: Hadlock, P.J., and Schmnan, S.J

(counsel on reverse)

July 2015

ROGGENDORF LAW LLC

Kristian Roggendorf, OSB #013990
kr@roggendorf-law.com
5200 Meadows Road, Suite 150
Lake Oswego, OR 97035
(503) 726-5927

Attorney for Amicus Curiae Oregon Trial Lawyers Association

THE BARTON LAW FIRM PC

William A. Barton, OSB No. 720209
attorneys@bartontrialattorneys.com
Brent W. Barton, OSB No. 062698
brent@bartontrialattorneys.com
214 SW Coast Hwy
Newport, OR 97365
(541) 265-5377

Attorneys for Plaintiff-Appellant-Respondent

COSGRAVE VERGEER KESTER LLP

Thomas M. Christ, OSB No. 834064
tchrist@cosgravelaw.com
888 SW 5th Ave Ste 500
Portland, OR 97204
(503) 323.9000

Attorneys for Defendant-Respondent-Petitioner on Review

SMITH FREED & EBERHARD PC

Jeffrey D. Eberhard, OSB No. 872132
jeberhard@smithfreed.com
111 SW 5th Ave, Suite 4300
Portland, OR 97204
(503) 227-2424

Amicus Curiae Smith Freed & Eberhard, PC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

INTRODUCTION

For over thirty years, this Court has recognized a statutory cause of action for serving alcohol to a visibly intoxicated person. Numerous cases both in this Court and in the Court of Appeals have accepted that cause of action and discussed what does and does not qualify under its elements. The bar and restaurant industry's 1979 bargain to eliminate claims for the negligence *per se* found in *Davis v. Billy's Con-Teena*, *Inc.*, 284 Or 351 (1978), ended up creating *former* ORS 30.950. Under then- and still-existing Oregon law on the implicit creation of statutory causes of action, the structure of the legislation itself created a standalone claim with the elements based on the statute.

Subsequently, this Court recognized a "statutory tort" under *former* ORS 30.950 in *Chartrand v. Coos Bay Tavern*, 298 Or 689 (1985), and cases that followed. The Legislature was aware of this judicial interpretation of *former* ORS 30.950 and took no steps to eliminate that statutory cause of action, despite the intervening thirty years and several amendments to *former* ORS 30.950. Most recently, the Legislature in fact reaffirmed in 2001 that a statutory cause of action exists under *former* ORS 30.950/current ORS 471.565. Amicus Oregon Trial Lawyers Association (OTLA) seeks to prevent the elimination of this long-accepted, fair, and narrow statutory liability. The decision of the Court of Appeals was correct and should be affirmed.

ARGUMENT ON THE MERITS

It is not a very close question whether, as a matter of current law, ORS 471.565 creates a statutory cause of action for third parties injured by drunken drivers. This Court recognized such statutory claims in the 1985 *Chartrand* decision, and further defined the contours of such claims in the extensive line of cases that followed. This Court's *Chartrand* holding was correct: under *Nearing v. Weaver*, 295 Or 702 (1983), the creation of "statutory liability" occurs when a statute contains a mandatory requirement or prohibition, and identifies a class of protected individuals. The *Chartrand* decision discerned all these elements in *former* ORS 30.950, and they continue to exist to this day under ORS 471.565.

The resulting statutory liability under ORS 471.565 comes from "a theory of tort law unfettered by negligence concepts of foreseeability … [because] the risk and the potential harm to the plaintiff have already been foreseen by the lawmaker." *Chartrand*, 298 Or at 695–96. *See also Campbell v. Carpenter*, 279 Or 237, 240 (1977) ("the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen"). *Cf Cain v. Rijken*, 300 Or 706, 717 (1986) ("Common law principles of reasonable care and foreseeability of harm are relevant because this case does not fall within a mandated statutory duty"). Therefore, the Court of Appeals was right in

holding that a separate statutory theory of liability existed under Oregon's well-trodden "statutory tort"/statutory liability doctrine. The Plaintiff here should have been permitted to present a claim for damages to the jury that did not require an element of foreseeability. Amicus OTLA urges this Court to affirm the Court of Appeals' decision on that ground, and joins the arguments in Plaintiff's thorough and well-considered Response Brief.

The closer question raised by Defendant King and the *Amicus* law firm Smith Freed & Eberhard (Amicus SFE) is whether the Legislature in 1979 ***intended*** to create a separate statutory cause of action when it first passed *former* ORS 30.950. ***But that is the wrong question.*** While Amicus SFE focuses on whether the participants in the 1979 legislative process could be presumed to have intended a new statutory cause of action, it fails to grapple with the intervening 30 years of legislative action since *Chartrand* that has failed to abolish or restrict these types of claims. Not only has the statutory cause of action survived, the most recent amendments to *former* ORS 30.950 went so far as to directly recognize the existence of a statutory cause of action on behalf of innocent third parties in cases involving the overserving of a visibly intoxicated individual. The request from Defendant King and Amicus SFE for this Court to adopt a new liquor liability policy for the state of Oregon should be addressed to the Legislature, not this Court.

The merits brief from Plaintiff cogently discusses the legislative history and amendments to liquor liability in Oregon during the years before and after *former* ORS 30.950 was enacted and *Chartrand* was decided. Only two points warrant further discussion. First, the legislative history immediately following the 1985 *Chartrand* decision shows the Legislature's awareness of the case's "statutory tort" interpretation, an acceptance of the status quo (even by opponents), and no inclination by the Legislature to remove that statutory cause of action. Second, the most recent amendment to what is now ORS 471.565 provides express recognition of "a cause of action, based on statute" for third party cases involving the over-service of visibly intoxicated individuals.

I. THE 1987 LEGISLATIVE AMENDMENTS TO FORMER 30.950 INDICATE AN ACCEPTANCE OF *CHARTRAND* AND STATUTORY TORT LIABILITY.

The Legislature could have "corrected" *Chartrand* along the lines suggested by Defendant King and Amicus as early as the 1987 legislative session. In 1987, the bar and restaurant lobby sought an amendment to *former* ORS 30.950 providing that liability would be limited to instances in which a bartender or social host served someone who was visibly intoxicated "from imbibing alcoholic liquor," as opposed to being intoxicated from other drugs. APP-37 – APP-41; APP-147 (S.B. 323 §§ 74, 75 (1987)). While most of the testimony on S.B. 323 dealt with things other than the statutory cause of action,

the Legislature was informed of the Supreme Court's imposition of a statutory liability under *Chartrand*, and no further discussion occurred.

Specifically, attorney Peter Glazer, speaking on his own behalf, informed the Senate Judiciary Committee in 1987 that *former* ORS 30.950 "in the Supreme Court's view" had "create[ed] a statutory tort." APP-47. He then turned his discussion to the case of *Blunt v. Bocci*, 74 Or App 697 (1985), the basis for S.B. 323, in which a bartender had served drinks to a man who was visibly "stoned," but not visibly drunk. In rejecting the idea that intoxication under *former* ORS 30.950 meant only alcohol intoxication, the Court of Appeals held that "if a patron exhibits symptoms of intoxication from any source, a bartender should not contribute to the patron's further intoxication, and potential hazard on the road, by serving him alcohol." *Blunt*, 74 Or App at 702. S.B. 323 was intended to change that decision. No other mention was made of *Chartrand's* holding throughout 74 full pages of testimony, spanning four days before various legislative committees.

In 1987, the proponents of further limiting liquor liability did not succeed in narrowing the scope of *former* ORS 30.950 to those who served individuals intoxicated solely by alcohol, but instead obtained a higher standard of proof:

> Oregon Laws 1987, chapter 774, section 13, amended ORS 30.950 to read:

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

Gattman v. Favro, 306 Or 11, 13 n1 (1988) (quoting 1987 amendment).

Indeed, *Gattman* pointed out that the 1979 effort perhaps backfired on the industry, given that it codified the very holding the industry was trying to limit:

> Section 1 of HB 3152, which, as modified, became ORS 30.950, was proposed to limit the holding in [*Campbell v. Carpenter*, 279 Or 237]. As originally drafted, Section 1 provided that licensees would not be liable unless they were grossly negligent in serving visibly intoxicated patrons. The gross negligence standard, however, was deleted from the bill in committee. ***As finally approved, ORS 30.950 codified the holding in* Campbell. *The language the Court of Appeals found to create a claim for inebriated patrons is part of the original language proposed by the Oregon Restaurant and Beverage Association to limit their liability to third parties.***

Gattman, 306 Or at 21 (emphasis added), quoting *Sager v. McClenden*, 296 Or 33, 37 (1983) (*former* ORS 30.950 did not create a statutory tort action in favor of an intoxicated person who was injured in a fall after being over-served).

Both *Sager* and *Chartrand* were on the books when the Legislature took up former ORS 30.950 in 1987. And despite taking a skeptical eye to the question

whether the 1979 legislative process intended to create a statutory tort, *Gattman* recognized that *Chartrand* and *Sager* both bear strongly on that analysis, and the Court in *dicta* conceptually approved the notion of a statutory tort against "very risk with which the legislature was concerned, the intoxicated driver." *Gattman*, 306 Or at 23-24.

Coming only a year after the 1987 amendment adding a heightened standard of proof, *Gattman* is instructive in the historical analysis of *former* ORS 30.950, and shows that both the legislative and judicial branches were aware of the then-novel use of statutory tort claims arising from *former* ORS 30.950. The absence of discussion of limiting the statutory tort during the S.B. 323 process—a process that saw the bill change radically from introduction to passage—is instructive in that those who wanted to further limit liquor liability chose not to revisit *Chartrand* immediately after its passage, and the Legislature showed no inclination to do so on its own. Certainly after this Court pointed out in *Sager* and *Gattman* that the purpose of the 1979 legislation had been perverted by the courts from one limiting liability to one expanding it, one might expect the Legislature to address its true intent for former ORS 30.950? But no. The industry and the Legislature let *Chartrand* stand, despite any inconsistency the decision might have had with the intent of the 1979 Legislature. That status quo would be maintained by these two groups through two other amendment processes. Although the absence of

evidence is not evidence of absence, the legislative process after *Chartrand* is a telling case of a dog that didn't bark.

II. THE 2001 AMENDMENTS TO *FORMER* ORS 30.950 EXPRESSLY ACKNOWLEDGE A STATUTORY CAUSE OF ACTION.

Former ORS 30.950 was amended next in 1997, to add notice-of-claim provisions, and no mention appears to have been made of the statutory cause of action. The statute was not amended again until 2001, after this Court declined to exempt those partially responsible for an intoxicated person's condition from recovery. *See Grady v. Cedar Side Inn*, 330 Or 42, 49 (2000). The legislative history of the 2001 amendment process shows that the Legislature was again aware of the continued existence of a statutory cause of action under *former* ORS 30.950. Attorney Michael Mills wrote a legal memorandum to the Oregon Restaurant Association about the latest cases involving claims from intoxicated persons themselves or those who had encouraged or assisted in the intoxication. That memorandum was submitted to the Legislature as part of the testimony on the 2001 proposed legislation. Mr. Mills mentioned that one of the recent cases involved "claims against defendant licensees for statutory liability under ORS 30.950 and common law negligence for serving alcohol to the driver of the vehicle when he was visibly intoxicated." APP-160. So in the 2001 legislative process, the Legislature was at least aware that statutory

claims were still being brought under former ORS 30.950, and that litigants had sought to expand those statutory claims to parties not initially covered under existing caselaw.

However, the 2001 legislative history is less interesting than the amendment itself. Under the amendment, S.B. 925 (2001), *former* ORS 30.950 was amended to read, in relevant part:

> A patron or guest who voluntarily consumes alcoholic beverages … ***does not have a cause of action, based on statute or common law***, against the person serving the alcoholic beverages, even though the alcoholic beverages are served to the patron or guest while the patron or guest is visibly intoxicated[.]

Former ORS 30.950 (1) (emphasis added). By necessary implication—or more properly express logic—someone who is not a "patron or guest who voluntarily consumes alcoholic beverages" ***does*** have a "cause of action, based on statute or common law" against a server of alcohol, as further provided in the statute. By passing that amendment, the Legislature itself necessarily recognized, in an explicit legislative enactment, that ORS 471.565 contains a statutory cause of action. Thus, the Legislature has apparently accepted the legal reality of a statutory cause of action under ORS 471.565, and has incorporated that reading into the structure of the statute itself.

After more than 35 years since the adoption of former ORS 30.950, and 30 years since *Chartrand* allowed for a "statutory tort," the liquor liability statute has changed significantly. Even if there was merit to the argument that

the 1979 legislative process did not envision a statutory cause of action for over-service of intoxicated individuals who go on to harm innocent third parties by driving drunk, that argument was finally and truly rejected by the Legislature in 2001 when it recognized that statutory causes of action existed. Although this Court in *Sager* struggled with and ultimately deferred the question of whether the 1979 Legislature could have intended the creation of a statutory cause of action, the 2001 amendments have put that argument to rest once and for all. This Court and the Court of Appeals got it right in prior cases finding that found or accepted a "statutory tort" under the elements of *former* ORS 30.950/current ORS 471.565. The Court of Appeals got it right in its opinion in this case, and that opinion should be affirmed.

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

/ / / /

CONCLUSION

For the foregoing reasons and those contained in Plaintiff-Respondent Deckard's Response Brief on the Merits, the decision of the Court of Appeals reversing the trial court should be affirmed, and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 9th day of July, 2015

ROGGENDORF LAW LLC

/s/ Kristian Roggendorf

Kristian Roggendorf, OSB #013990
kr@roggendorf-law.com
(503) 726-5927
(503) 726-5911 (fax)

Counsel for *Amicus Curiae* Oregon Trial Lawyers Association

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word count limitation in ORAP 9.17(2)(c), and (2) the word count of this brief (as described in ORAP 5.05(2)(b)(i), inclusive of footnotes and headers, but exclusive of the cover, table of contents, table of authorities, certificates and signature blocks), is 2,349 words as determined by the Word Count feature of Microsoft Word.

Type Face

I certify that the size of the type in this brief is not smaller than 14 point, Times New Roman font, for both the text of the brief and the footnotes, as required by ORAP 5.05(2)(d)(ii), and (4)(g).

DATED this this 9th day of July, 2015.

ROGGENDORF LAW LLC

/s/ Kristian Roggendorf

Kristian Roggendorf, OSB #013990
kr@roggendorf-law.com
(503) 726-5927
(503) 726-5911 (fax)

Counsel for *Amicus Curiae* Oregon Trial Lawyers Association

CERTIFICATE OF FILING AND SERVICE

I certify that on July 9, 2015, I filed **Amicus Brief** by electronic filing with the State Court Administrator at this address:

http://appellate.courts.oregon.gov/wps/myportal/

I also certify that on July 9, 2015, I served the following counsel through the Court's electronic filing system:

Brent W. Barton, OSB No. 062698
brent@bartontrialattorneys.com
The Barton Law Firm PC
214 SW Coast Hwy
Newport, OR 97365

Attorney for Plaintiff-Appellant-Respondent on Review

Thomas M. Christ, OSB No. 834064
tchrist@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW 5th Ave Ste 500
Portland, OR 97204

Attorney for Defendant-Respondent-Petitioner on Review

Jeffrey D. Eberhard, OSB No. 872132
jeberhard@smithfreed.com
Smith Freed & Eberhard PC
111 SW 5th Ave, Suite 4300
Portland, OR 97204

Attorney for Amicus Law Firm

I further certify that the following counsel was served conventionally by mail:

/ / / /

/ / / /

/ / / /

William A. Barton, OSB No. 720209
attorneys@bartontrialattorneys.com
Barton Law Firm PC
PO Box 870
Newport, OR 97365

Attorney for Plaintiff-Appellant-Respondent on Review

by depositing 2 copies of this brief, postage paid, in the U.S. mail on July 9, 2015.

DATED this this 9th day of July, 2015.

ROGGENDORF LAW LLC

/s/ Kristian Roggendorf

Kristian Roggendorf, OSB #013990
kr@roggendorf-law.com
(503) 726-5927
(503) 726-5911 (fax)

Counsel for *Amicus Curiae* Oregon Trial Lawyers Association