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OREGON LAW UPDATE

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Liquor Liability: The Great Debate about Alcohol and Violence

From the desk of Jeff Eberhard: A recent Court of Appeals decision addressed one of the seminal issues for dram shop litigation: is it foreseeable to tavern owners that serving a visibly intoxicated person, who is a first time customer, may cause an unreasonable risk of violent conduct

Claims Pointer: In order to show violence resulted from an establishment negligently serving alcohol to a visibly intoxicated person, a plaintiff must present sufficient evidence that the violent act was a reasonably foreseeable result of service. Mere speculation that visibly intoxicated persons are more prone to violence is not enough. Rather, a plaintiff must first plead and then prove specific facts—beyond the fact of visible intoxication—that the tavern owner who served the visibly intoxicated person knew, or had reason to know, that serving the person created the unreasonable risk that the person would become violent.

Chapman v. Mayfield, A150341, 2014 WL 2608550 (Or. Ct. App. June 11, 2014)

Carroll Mayfield ("Mayfield") went out for a night of drinking, which included a stop at the Eagles Lodge # 2151 Gresham (the "Lodge"). There, he was served whiskey and beer over the course of several hours. Mayfield later visited the Gresham Players Club, where he shot and injured plaintiffs Jason Chapman and Richard Gilbertson. The plaintiffs sued the Lodge, among others, asserting claims for common-law negligence and seeking damages resulting from the shooting. Specifically, the plaintiffs alleged that Lodge negligently served Mayfield while he was visibly intoxicated, which led to the shooting.

Under Oregon law, a tavern owner that negligently serves alcohol to a visibly intoxicated person may be liable for injuries to a third party resulting from the visibly intoxicated person's violent conduct, if it was foreseeable to the tavern owner that serving the person would create an unreasonable risk of violent conduct. The record showed that Mayfield had never been to the Lodge before the night of the shooting and that the Lodge had never experienced an incident of violence involving patrons whom they served alcohol, including those they had served who were visibly intoxicated. The Lodge filed a summary judgment motion on the ground that the plaintiffs had not presented evidence sufficient to create a factual dispute as to whether Mayfield's act of shooting the plaintiffs was the foreseeable result of the Lodge's act of serving alcohol to Mayfield while he was visibly intoxicated. The trial court agreed and granted the motion. The plaintiffs appealed.

The Court of Appeals addressed the level of "foreseeability" required to maintain an action for liquor liability (or commonly known as "dram shop" litigation). The court relied on the past precedent, *Moore v. Willis*, 307 Or 254, 767 P.2d 62 (1988), which stated

> "The fact that someone is visibly intoxicated, standing alone, does not make it foreseeable that serving alcohol to the person creates an unreasonable risk that the person will become violent."

The Court stated that to establish foreseeability, a plaintiff must first plead and then prove specific facts—beyond the fact of visible intoxication—from which an objectively reasonable fact-finder could find, or reasonably infer, that the tavern owner who served the visibly intoxicated person knew, or had reason to know, that serving that person created the unreasonable risk that that person would become violent. This includes proving facts that a tavern owner has general observations and past experiences from serving alcohol that give them reason to know that violence would be a foreseeable result of serving alcohol to a visibly intoxicated person. Alternatively, a plaintiff can establish foreseeability by proving facts showing that the tavern owner knew or had reason to know that the visibly intoxicated person in question had a propensity for violence that could be incited by further drinking.

Here, in opposing the Lodge's summary judgment motion, the plaintiffs did not present evidence that would permit a reasonable fact-finder to find or infer the facts that *Moore* requires. The plaintiffs' theory of foreseeability was that the Lodge had

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reason to know that serving Mayfield while he was visibly intoxicated created an unreasonable risk of violence "because those who are in the business of serving alcohol know that visibly intoxicated drinkers frequently become violent." The Court stated that the plaintiffs' inference was too tenuous and failed as a matter of logical probability. The Court went on further to state that it is not logical to assume that people in the business of selling alcohol know what medical experts on alcohol physiology and effects know about the connection between alcohol and violence, where the uncontroverted evidence shows that the Lodge did not previously have the opportunity to observe that connection firsthand from Mayfield. Further, it also is not logical to assume that the mere existence of unidentified medical, scientific and lay literature addressing the "connection between alcohol and violence means that that literature is of the ilk that people in the business of selling alcohol ordinarily would read—especially when some of that literature is directed toward the fields of medicine and science, and the rest is unidentified, leaving the fact-finder to speculate about what that literature is and who is likely to have read it."

It must be noted, however, that the Court made a comment that may be of concern moving forward for tavern owners facing dram shop claims. The Court stated that "[i]t may not have taken much additional evidence to convert those unfounded assumptions into permissible inferences." The dissent contended that the plaintiffs had submitted enough information that the summary judgment should be denied. The dissents conclusion was based on, in part, a web search of just one, of the many, third party training providers certified by the Oregon Liquor Control Commission ("OLCC"). The dissent states the materials of this provider contained information on specific techniques for cutting off intoxicated patrons in order to avoid fights and how to "keep control of the situation even though an intoxicated customer may be hostile, threatening, and irrational." As a result of this "statutorily-mandated training," the dissent argued that servers today are well aware of the dangers of overconsumption of alcohol. The dissent concludes that had the plaintiffs done the web search that the appellate judge had done, that may, *potentially*, have been enough to establish a question of fact that serving a visibly intoxicated patron created an unreasonable risk that a person would become violent and defeat a motion for summary judgment. Of course, the majority opinion disagreed with the opinion of the dissent.

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