

OREGON CASE UPDATE

Oregon Supreme Court: Dram Shop Statute Intended to Limit - Not Expand - Liability

case in point...

From the desk of Jeff D. Eberhard: Approximately one year ago, we notified you of an important change to Oregon's liquor liability law in the Oregon Court of Appeals' decision in *Deckard v. Bunch*, 267 Or App 41 (2014). As soon as the Court of Appeals' decision came down, my team and I started working immediately to overturn this case. Our firm's efforts resulted in not only reversing the Court of Appeals' decision, but also 30 years of cases that plaintiffs have been relying on to expand the liability of alcohol sellers and social hosts. Read on to see how the Oregon Supreme Court clarified liquor liability law after decades of confusion.

Claims Pointer: In this landmark liquor liability claims decision, the Oregon Supreme Court relied on legislative history prepared and presented by Smith Freed Eberhard to hold that Oregon's liquor liability statute, ORS 471.565 does not create an independent cause of action, but instead that it limits common law negligence claims. Moreover, the Court agreed with our arguments by overruling *Chartrand*, a case which has resulted in nearly 30 years of common belief—by both plaintiff and many defense attorneys—that in motor vehicle accidents, negligence was not required to prevail on a liquor liability claim. What this case means going forward is that Plaintiffs will be required to prove that a patron was served while visibly intoxicated and that it was reasonably foreseeable that the person would drive after leaving the pub/restaurant/bar. More importantly, the Court held that the statute, ORS 471.565, requires that the plaintiff must prove by clear and convincing evidence that the patron or guest was visibly intoxicated when served. This is a significant burden on the plaintiff's ability to recover.

Deckard v. Bunch, in the Oregon Supreme Court, 358 Or 754 (March 10, 2016).

Casey Deckard was driving on Highway 101 when a highly intoxicated driver, Diana Bunch, crossed into his lane and collided head-on with his car. Shortly before the accident, Bunch had consumed a number of alcoholic drinks at the home of Roland King.

Deckard brought an action against Bunch and King alleging common law negligence against both Bunch and King, and alleging statutory liability against King under ORS 471.565 for serving or providing alcohol to a visibly intoxicated guest. The trial court dismissed the statutory tort claim against King for failure to state a claim after our firm filed a motion to dismiss. At trial, the jury found Bunch negligent and awarded Plaintiff \$3,000,000, but returned a defense verdict for King. Plaintiff appealed its case against King and argued that the trial court erred in dismissing his statutory liability claim.

Relying heavily on a 1985 case, *Chartrand*, the Court of Appeals determined that the

original Dram Shop Statute "left no doubt that [it] gave rise to statutory liability of a commercial or social host who serves alcohol to a visibly intoxicated person." The court also looked to recent amendments of ORS 471.565 in 2001 and found no evidence that the legislature's changes undermined the reasoning in *Chartrand*. The Court of Appeals held that in its view, the legislative history, context, and text of ORS 471.565 demonstrated the legislature's intent to create statutory liability.

As previously mentioned, we set to work after the Court of Appeals' decision, which we knew was in error because over the past five years, more than 25 trial court judges throughout Oregon had agreed with us that there was no statutory claim for liquor liability. To strengthen our argument my team and I scoured the state archives for legislature history and poured through dozens of hours of legislative testimony and debate dating from 1979 to 2001. We also petitioned the Supreme Court for leave to file an amicus curiae ("friend of the court") brief on behalf of the Mr. King, which the Court granted.

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In our brief, we provided the entire legislative record discussing Oregon's liquor liability laws, including a complete transcription of the record of numerous hours of testimony. Through our research, we discovered that prior Courts had relied on summaries of legislative testimony ("legislative minutes"), but not the testimony itself. In our brief, we encouraged the legislature to reconsider its prior holdings in light of the actual testimony, which clearly demonstrated that the intent of the liquor liability law was to reduce insurance costs for restaurants, bars, and other providers of alcohol by limiting their liability. In light of that intent, we argued that the legislature never intended to create a new statutory cause of action beyond common law negligence, which requires proof of foreseeability.

We also pointed out that Chartrand was flawed in a number of ways including: that the issue of statutory liability was not briefed by the parties, it ignored prior case law, and its analysis of legislative history relied almost exclusively on an article written by a third-year law student (a fact that appeared to have gone unnoticed until we pointed it out to the Court), which was flatly wrong. We encouraged the Court to reconsider and disavow Chartrand, especially in light of the complete legislative record before it.

We are pleased to report that the Court agreed completely with our arguments, reversing the Court of Appeals' decision, disavowing Chartrand, holding that ORS 471.565 does not create a statutory cause of action, and reinforcing that ORS 471.565 requires plaintiffs to prove additional elements. The Court relied extensively on our briefing and the legislative history we provided to conclude that the text, context, and legislative history all suggested that it was the

legislature's intent to limit, rather than expand, liability. The Court then examined case law and subsequent amendments to the liquor liability law and ultimately held that the part of Chartrand that suggested plaintiffs may bring a statutory cause of action was disavowed.

The effect of this case on liquor liability in Oregon cannot be understated. It establishes that a plaintiff injured by an overserved tortfeasor may only recover from the person or business that provided the tortfeasor alcohol if they can prove the elements of common law negligence and the elements of ORS 471.565:

- Prove by clear and convincing evidence that defendant served or provided alcohol to a clearly intoxicated patron or guest.
- Prove by clear and convincing evidence that the plaintiff did not substantially contribute to the patron or guest's intoxication by providing alcohol, encouraging the patron to consume alcohol, or otherwise facilitating the consumption of alcohol.
- Prove that they provided adequate notice of a claim within 180 days injury or one year in the case of wrongful death.

This case puts to rest a number of confusing arguments raised by plaintiffs' attorneys for nearly 30 years.

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