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OREGON CASE UPDATE

case in point...

Plaintiff Who Voluntarily Consumed Alcohol May Sue Social Host-Effect On Business Unclear

From the desk of Jeff Eberhard: In 2001, Oregon passed a law that prevented customers and social guests that voluntarily consumed alcohol from asserting a claim against those who provided them with alcohol. In a case involving a social host, the Oregon Court of Appeals held that this statute was in violation of the remedy clause of Oregon's Constitution. This approach is a radical new change which we expect to be appealed to the Oregon Supreme Court.

Claims Pointer: In this case arising out of a severely injured intoxicated driver, The Court of Appeals considered whether Oregon's Dram Shop statute prohibited a driver from suing a social host for injuries she suffered in the car accident. The Oregon Court of Appeals ultimately held that the statute prohibiting voluntarily intoxicated individuals from bringing a claim against the person who provided alcohol was in violation of the remedy clause of Oregon's Constitution. Given the significance of this issue, the court's analysis was shockingly brief in length and citation of law to support it.

Our firm specializes in the defense of liquor liability claims. We prepared a white paper that identifies how Oregon's liquor liability statute can be used to defeat or reduce the risk of a plaintiff's claim. Please contact us if you would like a copy.

Schutz v. La Costita III, Inc., 288 Or App 476 (2017)

Ashley Schutz "(Schutz") worked as a temporary office assistant for O'Brien Constructors, LLC. After declining numerous invitations to join her supervisor and fellow employees for drinks, Schutz agreed to join. Schutz alleged that she was reluctant to join but felt pressured in order to advance her job. Keeley O'Brien, the supervisor of O'Brien Constructors, LLC, Schutz, and other employees left work early that day and headed over to a nearby restaurant, La Costita, where Schutz continued to drink until she was intoxicated. Schutz then left La Costita in her vehicle, drove her car the wrong way on the freeway exit ramp, and seriously injured herself in a head-on collision.

Schutz sued O'Brien and the O'Brien Constructors, LLC (collectively "Defendants"). Schutz alleged that O'Brien was negligent in organizing and pressuring her to attend the event, knowing that excessive amounts of alcohol would be consumed, and by failing to warn Schutz that excessive amounts of alcohol would be expected to be consumed. Schutz alleged vicarious liability against O'Brien Constructors, LLC. Defendants asserted that Plaintiff's claims, were limited by Oregon's Dram Shop statute ORS 471.565(1), which prohibited individuals who voluntarily consumed alcohol served by a social host from bringing a claim against the social host. ORS 471.565(1) states:

> A patron or guest who voluntarily consumes alcoholic beverages served by a [person licensed by the Oregon Liquor Control Commission, a person holding a permit issued by the commission or a] social host 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. The provisions of this subsection apply only to claims for relief based on injury, death or damages caused by intoxication and do not apply to claims for relief based on injury, death or damages caused by negligent or intentional acts *other than the service of alcoholic beverages* to a visibly intoxicated patron or guest. (Of Note: The bracketed

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section regarding commercial alcohol providers was omitted by the Schutz court -apparently because the defendant was a social host.)

The trial court agreed with Defendants and dismissed the claims. Schutz appealed, and on appeal, made two arguments. First, she argued her claims fell into the exception in the second sentence of ORS 471.565(1), which allowed claims "based on injury, death or damages caused by negligent or intentional acts other than the service of alcoholic beverages" (emphasis added). She argued that the negligence of Defendants occurred "before the serving of alcohol, in training and in permitting, planning, and authorizing the event at La Costita." Second, Schutz argued that if the exception does not apply, ORS 471.565(1) violates Article sections 10 and 17 of the Oregon Constitution.

The Oregon Court of Appeals first considered whether Schutz' claim fell within the exception found in the second sentence of ORS 471.565(1). The court provided a general overview of ORS 471.565(1). The court explained that the first sentence prohibits any action against the social host by a person who voluntarily consumed alcohol. The second sentence provides an exception, and allows claims caused by negligence or intentional acts "other than the service of alcoholic beverages." The court explained that there was no dispute that Defendants were "social hosts" within the meaning of the statute. (Prior Oregon case law has held that even when alcohol is served at a bar, the one who orders the drinks and/or picks up the tab may be a social host.) The court then reasoned that all of the risks alleged by Schutz were ultimately based on the service of alcohol and Schutz' voluntary consumption of alcohol. Accordingly, the court held that Schutz' claim did not fall into the exception contained in the second sentence of ORS 471.565(1).

The Oregon Court of Appeals next considered whether ORS 471.565(1) violated the remedy clause of Article I, section 10. (This section states that "…every man shall have remedy by due course of law for injury done him in his person, property or reputation.") On the same date the *Schutz* case was decided, the Court of Appeals decided *Vasquez v. Double Press*, finding that in some situations Oregon's $500,000 cap on noneconomic damages may be unconstitutional under the remedy clause. [See our case update on *Vasquez v. Double Press*]. The analysis in both *Vasquez* and *Schutz* was based on a May 2016 Oregon Supreme Court opinion that overturned a 15 year old court decision on how to analyze the remedy clause in Oregon's constitution. *Horton v. OHSU*, 359 Or 168 (2016). Prior case law had stated that the proper way to analyze whether legislation was in violation of the remedy clause was first to consider if an action existed at the time Oregon became a state in 1859. After *Horton*, the question was whether a cause of action existed at the time the legislature acted.

The court found that when ORS 471.565(1) was enacted in 2001, the claims alleged by Schutz against O'Brien existed as "general common-law negligence principles" i.e. Defendant had a duty because there was a foreseeable risk of harm of the kind that injured the Plaintiff. (Notably, these claims came into "existence" in an Oregon Supreme Court opinion decided 3 months before the 2001 legislative session). The next step was to evaluate the extent of the legislature's departure from the foreseeability/duty model against the legislature's reason for doing so. For this step of the analysis, the court considered whether the legislation fell within any of three categories outlined in *Horton*, which the *Schutz* court summarized as:

(1) Legislation that does not alter a common-law duty, but instead, limits or denies the injured person the remedy.

(2) *Quid pro quo*, which is legislation that "adjusts" a person's rights and remedies as

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part of a larger statutory scheme that extends benefits to some while limiting benefits to others.

(3) Legislation that modifies or eliminates common-law causes of action because the premises underlying the duties and causes of actions have changed.

The court held that ORS 471.565(1) fell into the first category. A social host/bartender still had a duty to not serve a visibly intoxicated person because if the intoxicated person injured someone else, that third party may have a claim against the alcohol provider. According to the court, ORS 471.565(1) was not enacted as part of a larger statutory scheme. Nor was it eliminating "common-law duties" because the premises underlying the common-law duties had changed. (The fact that the Oregon Supreme Court determined that this claim was proper a mere 3 months before the 2001 legislative session met and passed legislation to "overrule" that court opinion, was not discussed in *Schutz*.) Instead, according to the *Schutz* court, the legislature simply eliminated a claim by a person who voluntarily consumed alcohol against the server. The court stated the statute eliminated common-law claims, no matter what kind of negligence, as long as the injury was ultimately caused by voluntary intoxication. Once the court decided that ORS 471.565(1) fell into the first category, it further concluded, in a rather brief and conclusory manner, that ORS 471.565 was "unconstitutional because it falls within a legislation that the remedy clause prohibits."

We believe that *Schutz* was improperly decided and should be appealed to the Oregon Supreme Court. The *Horton* opinion was 76 pages, with a 53-page concurrence opinion that outlined the problems with the majority opinion – discussing that the tests do not "offer any real doctrinal clarity" – and questioning whether the majority opinion's discussion is sufficient to guide future courts. *Horton* at 283-285. The *Schutz* analysis of the constitutional question was 2 pages long and cited only the *Horton* case on the constitutional issue. We are of the opinion that if this issue is accepted by the Supreme Court there is a very high likelihood it would be reversed.

Schutz involved a social host. It would appear to apply to restaurants/taverns/bars, but different arguments exist in support of its constitutionality for commercial alcohol providers. First, the Dram Shop Act was adopted in 1979 because liquor liability insurance was not merely costly, insurers were unwilling to event write liquor liability insurance. Second, in 1997 the Oregon legislature required commercial alcohol providers to have liquor liability insurance- a *quid pro quo* that would allow all deserving claimants to recover, not just those where the provider had insurance. Last, since the injured party was a customer, this would mean they were a business invite and the "common-law" foreseeability/duty concept may not be applicable.

The benefits of Oregon's liquor liability statute are many-even with this new case. There have been more court opinions in this area in the past 3 years than the prior 20 years. We have prepared a white paper that details how the statute can be used to eliminate or reduce claims against alcohol providers. Please contact us for a copy.

View full opinion at: http://www.publications.ojd.state.or.us/docs/A157621.pdf

Case updates are intended to inform our clients and others about legal matters of current interest. They are not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

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