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Disturbing Court of Appeals Decision Reversed: Oregon Supreme Court Reaffirms That Restaurants and Taverns Do Have Immunity For "First Party" Claims of Over-Service of Alcohol

From the Desk of Jeff Eberhard: In 2017, the Oregon Court of Appeals sent shockwaves through the hospitality industry when it held that a section of Oregon's liquor liability statute was unconstitutional because it denied a severely injured, intoxicated driver a remedy for her injuries allegedly caused by a social host. As expected, the Oregon Supreme Court accepted review. My star senior counsel Jeremy Reeves and I submitted extensive *amicus curiae* briefing addressing the flaws in the court of appeals' constitutional analysis and why the entire statute passes constitutional muster. We expected that the Supreme Court would use the case to settle the issue of whether the court of appeals erred in holding the statute unconstitutional. Did it? Read on to find out.

Claims Pointer: With potentially dramatic implications for any business that serves or sells alcohol, the Oregon Supreme Court reviewed the court of appeals' opinion holding a portion of Oregon's liquor liability statute unconstitutional. Rather than explicitly addressing the constitutional issue, the Supreme Court simply affirmed the court of appeals' ruling on other grounds. Fortunately for the hospitality industry, this Supreme Court decision means that Oregon's liquor liability statute continues to provide immunity for first-party claims for over-service. However, this case potentially opens the door to claims against social hosts when operating in a dual function, such as operating as an employer and a social host.

Schutz v. La Costita III, Inc., et al., 364 Or 536 (Mar. 14, 2019).

We discussed the facts underlying this matter in our previous case update, which you can find in our knowledge center here. In short, Ashley Schutz ("Schutz") was seriously injured after drinking to intoxication with co-workers and then driving the wrong way on a freeway exit ramp. She had been employed by O'Brien Constructors, LLC as a temporary office assistant and joined her co-workers and supervisor for drinks at a local La Costita restaurant. Schutz originally sued the restaurant, La Costita, where she consumed alcohol, as well as O'Brien Constructors, LLC and her direct supervisor, Keeley O'Brien. After La Costita was dismissed from the action on summary judgment, Schutz continued her lawsuit against the Keeley O'Brien and O'Brien Constructors, LLC ("Defendants").

The remaining Defendants also moved for summary judgment, asserting that, as social hosts, they were entitled to the same immunity from Schutz's claims as La Costita – citing Oregon's liquor liability statute, ORS 471.565(1), which states (underlining added):

> 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

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> 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.

In response, Schutz argued that her claims against her employer should be allowed to continue because they alleged negligent acts "before she went to the bar where alcohol was served." Schutz argued in the alternative that the statute was unconstitutional under Oregon's constitutional remedy clause. The trial court rejected both arguments and granted summary judgment to Defendants. Schutz appealed.

The Court of Appeals held that in enacting the liquor liability statute, "the legislature had intended to eliminate the common-law claim of a voluntarily intoxicated person—no matter what the specification of negligence, so long as the injury was ultimately caused by voluntary intoxication." Because Schutz's injuries arose from her voluntary consumption of alcohol, statutory immunity applied to all claims – meaning summary judgment was appropriate.

However, the court of appeals wasn't done and it next analyzed Schutz' constitutional argument. In shockingly conclusory fashion, the panel held that the liquor liability statute "was unconstitutional because it retained certain common-law duties but denied plaintiff any remedy for breach of those duties." Thus, having determined that the first party immunity section of the liquor liability statute (set out in full above) was an unconstitutional violation of Oregon's remedy clause, the panel overturned summary judgment and remanded the case for trial on all claims. Defendants petitioned the Oregon Supreme Court for discretionary review, which the court accepted.

At the Supreme Court, Defendants argued that the court of appeals had erred in finding the liquor liability statute unconstitutional. Our firm and the Oregon Liability Reform Coalition each submitted *amicus curiae* briefs in support of Defendants' position. Our briefing focused on the court of appeals' cursory and erroneous analysis of the application of Oregon's remedy clause to Oregon's liquor liability statute and the detailed legislative history that supported its constitutionality. The Oregon Liability Reform Coalition's brief focused on the dangerous expansion of judicial powers and associated violation of the separation of powers at issue if the opinion was left standing.

Notwithstanding this backdrop, the Oregon Supreme Court determined that the question it was required to answer was not whether the statute was constitutional, but rather "whether a defendant who fits the definition of a server or social host is immune from liability only when alleged to be acting as a server or social host or also when alleged to be acting in another role, such as property owner or employer."

Based on this question, the court engaged in statutory interpretation of the liquor liability statute. As usual, it began with the plain text of the statute itself. For purposes of its review, it distilled the statute into two sections: (1) "a patron or guest who voluntarily consumes alcohol cannot bring an action against licensed servers or social hosts serving...alcoholic beverages, even though the beverages are served to a patron or guest who is visibly intoxicated"; and (2) "the provision's immunity *appl[ies] only* to claims relief based on injuries *caused by intoxication*" and "the provision's immunity *does not apply* to claims for relief based on injuries *caused* by negligent or intentional *acts other than the service of alcoholic beverages* to a visibly intoxicated patron or guest." (emphasis in original) (internal quotation marks omitted).

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The Court identified two plausible interpretations of the statute. The first plausible reading, advocated for by Schutz, was that: "the immunity provided for claims against servers and social hosts extends only to a limited set of claims—claims in which the plaintiff's injuries were caused, at least in part, by the plaintiff's own intoxication—but does not extend to claims in which the plaintiff's injuries also were caused by a defendant's tortious acts other than the service of alcoholic beverages." The second plausible reading, advocated for by Defendants, was: "that the immunity provided for claims against servers and hosts extends to all claims in which a plaintiff's intoxication causes the plaintiff's injury, including those claims in which the plaintiff alleges that the server or social host committed a tortious act other than the service of alcoholic beverages."

Schutz argued that her claims against defendants were viable because "although her intoxication may have been one cause of her injuries, her injuries also were caused by defendants' tortious acts in their roles as her employer and supervisor, and the statute does not bar such claims."

The Court sided with Schutz—describing her interpretation as the "most plausible." The Court provided three reasons: (1) Defendants' reading that there was only one cause of Schutz's injuries (i.e., her voluntary intoxication) made "neither logical nor legal sense"; (2) Defendants' reading of the statute would render the second clause (i.e., that "the provision's immunity does not apply to claims for relief based on injuries *caused* by negligent or intentional *acts other than the service of alcoholic beverages*") meaningless; and (3) the language in the second sentence—that the provision "appl[ies] only to claims for relief based on intoxication"—was intended to narrow the circumstances in which immunity applies, not to allow the provision to apply "whenever a plaintiff's injuries are caused by intoxication." In sum, the Court held that the text of the liquor liability statute "provides immunity for claims against servers and social hosts only for their actions as servers or social hosts" and that "servers or social hosts who are not sued in their capacity as servers or hosts, but rather, in some other capacity, are not entitled to immunity."

Although the Court's interpretation of the text of the statute seems to be the basis for its decision, the opinion also analyzed the legislative history in support of its reading – specifically, the statute's 2001 amendments, which were proposed and enacted by Oregon's legislature in direct response to the holding in *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413 (2000). *Fulmer* allowed a claim against a tavern by an intoxicated patron who was injured when he had difficulty due to his intoxication in navigating a set of stairs that were otherwise safe and sound. The legislative amendment overruled *Fulmer*, expressing clearly that no claim existed for that situation, but still permitting an intoxicated patron to bring claims where "a ripped carpet, a bad handrail, a broken stair, *contributed to the accident*..." (italics in original).

In order to accomplish that goal, an amendment, which became the second sentence of ORS 471.565(1), was proposed by the Oregon Trial Lawyers Association in order "to provide that, although servers would be immune for their actions as servers, they would not be immune for their actions as property owners." According to this version of history and notwithstanding the Court conceding that there were comments made in the legislative history that clearly denoted that the bill was intended to preclude "all claims by patrons whose injuries are caused, even in part, by their intoxication," the Court determined that the legislative history supported its conclusion that "ORS 471.565(1) grants immunity to licensed servers or social hosts only when patrons or guests bring claims against them in their roles as servers or hosts and only when voluntary intoxication was a cause of the alleged injuries."

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With that conclusion in hand, the Court determined that Schutz's claims against Defendants Keeley O'Brien and O'Brien Constructors could survive because they were not based entirely on their actions as social hosts, but rather, included negligence claims based on their actions as her employer and supervisor(s). The Court was careful to say that it was not deciding that the plaintiff's negligent employment/supervision claims against her employer were valid – that issue was left to the trial court on remand – merely that all claims were not automatically prohibited by the liquor liability statute. In fact, the Supreme Court offered a footnote that will limit the potential claims that may be brought against social hosts. Specifically, it wrote that "[o]ne allegation that may cross the line [against a social host] is plaintiff's allegation that [Defendant] Keeley O'Brien was negligent in 'supervising an employee function at defendant La Costita's facility.'"

Moreover, although it was not directly at issue in this appeal, the Court went out of its way to note that the earlier court of appeals decision, dismissing the claims against defendant La Costita, was properly decided and that all the plaintiff's "first party" claims against the tavern itself were barred by the liquor liability statute. The court explained that even claims such as failing to stop plaintiff from driving or failing to arrange alternative transportation arose from the taverns' role as a server of alcohol and were therefore properly barred under the statute – or in the words of the Oregon Supreme Court "La Costita was entitled to immunity".

We believe that the Supreme Court should have utilized this case to affirm the constitutionality of the liquor liability statute. Nonetheless, the opinion does, in effect, affirm the continued viability of the liquor liability statute in terms of providing immunity for servers of alcohol within the hospitality industry and social hosts when acting solely in the capacity as a server of alcohol. As a result of the Court's refusal to examine the liquor liability statute's constitutionality, we anticipate that some plaintiffs, injured as a result of their own intoxication, will again attempt to challenge the statute on constitutional grounds. When that happens, we stand ready to prove that the statute is constitutional.

View full opinion at https://cdm17027.contentdm.oclc.org/digital/pdf.js/web/viewer.html?file=/digital/api/collection/p17027coll3/id/7124/download#page=1&zoom=auto

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