IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Ashley SCHUTZ,
Plaintiff-Appellant,
v.
LA COSTITA III, INC.,
Defendant,
and
O'BRIEN CONSTRUCTORS, LLC;
and Keeley O'Brien,
Defendants-Respondents.
Multnomah County Circuit Court
101217338; A157621

David F. Rees, Judge.

Argued and submitted November 25, 2015.

J. Randolph Pickett argued the cause for appellant. With him on the briefs were R. Brendan Dummigan, Kimberly O. Weingart, Ron K. Chung, and Pickett Dummigan LLP; Brian R. Whitehead, and Law Offices of Brian R. Whitehead, P.C.

John R. Barhoum argued the cause for respondent O'Brien Constructors, LLC. With him on the brief were Jay R. Chock and Chock Barhoum LLP.

Andrew D. Glascock argued the cause for respondent Keeley O'Brien. With him on the brief were Curtis M. Burns and Hiefield Foster & Glascock LLP.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Egan, Judge.

HADLOCK, C. J.

Reversed and remanded.

HADLOCK, C. J.

Plaintiff appeals from a judgment of the trial court dismissing her claims for personal injuries against defendants, her employer and supervisor, after granting defendants' motion for summary judgment. We conclude that the trial court erred in granting defendants' motion and therefore reverse and remand.

In reviewing the trial court's ruling on defendants' motion for summary judgment, we view the record in the light most favorable to plaintiff to determine whether there is a genuine issue of material fact and, if not, whether defendants are entitled to judgment as a matter of law. ORCP 47 C. We summarize the largely undisputed relevant facts from the record on summary judgment. Plaintiff worked for defendant O'Brien Constructors, LLC, as a temporary office assistant. After declining invitations on four or five occasions to join her supervisor, defendant O'Brien, and other employees for drinks after work, plaintiff reluctantly agreed to attend a gathering, feeling pressured to do so to advance in her job. O'Brien, plaintiff, and other employees left work a bit early on the day in question and went to a restaurant, La Costita, where O'Brien paid for drinks and plaintiff drank to the point of intoxication. After leaving La Costita, plaintiff drove her car the wrong way on a freeway exit ramp and was seriously injured in a head-on collision.

Plaintiff brought this action against O'Brien and O'Brien Constructors, LLC (defendants).[1] As against O'Brien individually, plaintiff's first amended complaint alleged that O'Brien was negligent:

> "a) In organizing, arranging, and supervising an employee function [at La Costita] knowing that excessive amounts of alcoholic beverages would be purchased for, served to, and consumed by the employees attending the function;
>
> "b) In pressuring plaintiff to attend the function, in spite of her previous refusals of previous invitations, by

[1] Plaintiff also sought workers' compensation benefits for her injuries, *Schutz v. SAIF*, 253 Or App 541, 291 P3d 761 (2012), and brought a negligence action against La Costita. *Schutz v. La Costita III, Inc.*, 256 Or App 573, 302 P3d 460, *rev den*, 354 Or 148 (2013).

> creating the impression that her advancement in the company depended on [O'Brien] liking her, and that if she refused this invitation, after refusing prior invitations, that she would be less likely to retain her position or obtain desired promotions within the company;
>
> "c) In failing to warn plaintiff that excessive amounts of alcoholic beverages would be purchased for, served to, and expected to be consumed by the employees attending the function."

As against O'Brien Constructors, LLC, plaintiff's allegations were based on vicarious liability and also alleged that O'Brien Constructors, LLC, was directly liable in negligence:

> "a) In permitting [O'Brien] to organize, arrange, and supervise work-related activities away from the work site at establishments where alcoholic beverages were served * * * when defendant O'Brien Constructors knew, or in the exercise of reasonable care should have known, that excessive amounts of alcoholic beverages would be consumed;
>
> "b) In failing to adequately train [O'Brien] in terms of proper methods of enhancing and improving work and employee relationships, and that such methods should not involve leaving work early, proceeding to establishments where alcoholic beverages would be served, purchasing excessive amounts of alcoholic beverages for employees, and encouraging employees to actively participate in those types of activities."

Thus, the alleged negligence with respect to defendant O'Brien, individually, was in organizing and pressuring plaintiff to attend an event where excessive amounts of alcohol would be served and consumed, and failing to warn plaintiff that excessive alcoholic beverages would be served and expected to be consumed; the alleged negligence with respect to defendant O'Brien Constructors was based on vicarious liability for defendant O'Brien's negligence, as well as direct liability for negligence in the training and supervision of O'Brien.

Defendants moved for summary judgment, contending, among other arguments, that plaintiff's claims are barred by ORS 471.565(1), as interpreted in *Schutz v.*

La Costita III, Inc., 256 Or App 573, 302 P3d 460, *rev den*, 354 Or 148 (2013) (*Schutz*), which involved this same plaintiff's negligence claims against La Costita. ORS 471.565(1) provides:

> "A patron or guest who voluntarily consumes alcoholic beverages served by 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."

(Emphases added.) In *Schutz*, which we discuss in greater detail below, we held that ORS 471.565(1) provided immunity to La Costita for, after the serving of alcohol, allowing plaintiff to leave La Costita in an intoxicated state. 256 Or App at 585.

It is undisputed that in this case defendants were "social hosts" within the meaning of ORS 471.565(1). In granting defendants' motion for summary judgment, the trial court reasoned that it was bound by our interpretation of ORS 471.565(1) in *Schutz*, in which we concluded that the statute provides immunity to a social host for any claim for damages that are caused by the voluntary consumption of alcohol.[2]

On appeal, plaintiff asserts that her claims fall within an exception to immunity described in the second sentence of ORS 471.565(1), for claims "based on injury, death or damages caused by negligent or intentional acts other than the service of alcoholic beverages." Plaintiff

---

[2] The trial court did not necessarily agree with our interpretation of ORS 471.565(1) in *Schutz*, stating, "the way I parsed out the statute with the second sentence of the statute was that somebody could theoretically assert a cause of action if the plaintiff could establish if the defendant knew or should have known * * * before alcohol's served that there is a scenario where the defendant knew or should have known that the plaintiff was going to come and basically become intoxicated to the point of incapacitation."

notes that the complaint does not allege that defendants were negligent in the serving of alcohol. Rather, defendants' negligence is alleged to have occurred before the serving of alcohol, in training and in permitting, planning, and authorizing the event at La Costita. Plaintiff further asserts that, if ORS 471.565(1) bars this action, it violates Article I, sections 10 and 17, of the Oregon Constitution.

We begin our analysis with a discussion of the statute's text, as construed in *Schutz*. The first sentence of ORS 471.565(1) states a broad prohibition of any action, based either on statute or the common law, against a person serving alcoholic beverages, by a patron or guest who voluntarily consumes alcoholic beverages. The patron or guest "does not have a cause of action" against the server, even if the patron or guest was served while visibly intoxicated. The second sentence of ORS 471.565(1) explains when the statutory immunity will exist, specifying that it applies only to claims for relief that are based on injury, death, or damages caused by intoxication, and not to claims for relief for injury, death or damages caused by negligent or intentional acts "other than the service of alcoholic beverages."

In *Schutz*, we addressed the application of ORS 471.565(1) in the context of this same plaintiff's negligence claims against La Costita. As relevant here, plaintiff alleged, among other specifications, that the restaurant was negligent (1) in serving plaintiff while she was visibly intoxicated; (2) in abandoning plaintiff in an acute state of intoxication and alcohol poisoning by permitting her to leave the restaurant; and (3) in failing to arrange safe transportation for plaintiff when it knew or should have known that she was acutely intoxicated and incapable of driving. On the restaurant's motion to dismiss under ORCP 21 A(8), the trial court ruled that ORS 471.565(1) bars any claim against a server of alcohol by the person who is served for injuries caused by the person's intoxication. 256 Or App at 577.

On appeal, we affirmed the dismissal. We explained that the legislative history of ORS 471.565(1) indicated "a legislative understanding that the statute would bar claims against alcohol servers by intoxicated patrons who injure themselves as a result of their own actions." *Id.* at 582.

Plaintiff contended that her consumption of alcohol became involuntary after she became too intoxicated to appreciate her condition. *Id.* at 578-79. Based on our understanding of the undisputed facts and the statutory text, as illuminated by the legislative history, we held that plaintiff's consumption of alcohol was "voluntary" within the meaning of the statute and the cause of her injuries. *Id.* at 583. We therefore upheld the trial court's dismissal of the specification of negligence based on the negligent serving of alcohol.[3]

We then addressed the specifications of negligence that plaintiff asserted did not depend on the service of alcohol: the abandonment of plaintiff and the failure to provide her with transportation home. We acknowledged that the second sentence of ORS 471.565(1) "permits causes of action that are *not* caused by the service of alcoholic beverages." *Id.* at 583 (emphasis in original). But we rejected plaintiff's contention that the restaurant's alleged negligence in abandoning plaintiff and not providing her with transportation home did not ultimately depend on the service of alcohol or on plaintiff's voluntary consumption of alcohol:

> "The second sentence of ORS 471.565(1) permits causes of action that are *not* caused by the service of alcoholic beverages, and there is nothing in plaintiff's complaint from which a juror could find or infer that plaintiff's injuries were caused by anything else. Put another way: Had plaintiff *not* voluntarily consumed alcoholic beverages, there could not possibly have been any foreseeable risk that allowing her to depart or failing to call alternative transportation would have caused her injury."

---

[3] In *Schutz*, we explained that ORS 471.565(1) was enacted in response to the Supreme Court's opinion in *Fulmer v. Timber Inn Restaurant and Lounge, Inc.*, 330 Or 413, 9 P3d 710 (2000), which held that there is a common-law right of action for alcohol-related damages against a server for negligently supplying alcohol to a visibly intoxicated person. *Fulmer* had overruled *Miller v. City of Portland*, 288 Or 271, 279, 604 P2d 1261 (1980), in which the court had held that Oregon did not recognize "first party" common-law negligence claims in favor of an intoxicated person. *Fulmer* also observed that *Miller* had overlooked the court's earlier decision in *Ibach v. Jackson*, 148 Or 92, 35 P2d 672 (1934), in which the court previously had "recognized for the first time a common-law claim in favor of an intoxicated person on the theory that the defendant negligently had furnished the person alcohol." *Fulmer*, 330 at 420. We said in *Schutz* that the legislative history shows an intention, through the enactment of ORS 471.565(1), to "bar claims against alcohol servers by intoxicated patrons who injure themselves as a result of their own action." *Schutz*, 256 Or App at 583.

Id. (emphases in original). We reasoned, essentially, that the foreseeability of the risk of harm as a result of the restaurant's alleged negligence depended, as a factual matter, on plaintiff's voluntary consumption of alcohol. We concluded that the statute's text and legislative history reflected an intention to bar claims for injuries suffered as a result of plaintiff's own voluntary intoxication, no matter what negligent act by the defendant may also have contributed to or caused the injury, if the risk of harm arose from plaintiff's voluntary consumption of alcohol. We further rejected plaintiff's contention that, because the alleged negligence was not the service of alcohol but conduct that occurred subsequent to the service of alcohol, the acts fell outside of the statute:

> "Further, as defendant also notes, providing immunity for servers who provide alcohol to visibly intoxicated patrons, but simultaneously revoking that immunity if the servers fail to ensure the patron's safety, would effectively create an exception that swallows up the rule. In sum, we conclude that ORS 471.565(1) bars all of plaintiff's negligence specifications."

Id. The Supreme Court denied review of our opinion in *Schutz*. 354 Or 148, 311 P3d 525 (2013).

Plaintiff's claims in this action are based on conduct that occurred before the service of alcohol and before plaintiff became voluntarily intoxicated, and in that sense they differ factually from the claims that we concluded were barred in *Schutz*. Plaintiff contends for that reason that *Schutz* does not control and, further, that, because the specifications of negligence are not based on the act of serving alcohol, the immunity provided by ORS 471.565(1) is not applicable.

Defendants respond that a plaintiff cannot avoid immunity under ORS 471.565(1) for injuries caused by the service of alcohol and voluntary intoxication simply by pleading and establishing negligent conduct that preceded the service and consumption of alcohol. Defendants contend that *Schutz* supports the conclusion that ORS 471.565(1) provides blanket immunity to servers and social hosts against *any action* based on a failure to protect a person from the effects of voluntary intoxication, and that plaintiff's allegations fall

within the scope of that immunity. *See Schutz*, 256 Or App at 582 (legislative history shows "a legislative understanding that the statute would bar claims against alcohol servers by intoxicated patrons who injure themselves as a result of their own actions"). Defendants assert, additionally, that the alleged specifications of negligence here ultimately do bear on defendants' conduct as a social host in serving alcohol, for which the statute provides immunity.

We agree with defendants' understanding of the statute. As in *Schutz*, although the alleged negligence is not in the service of alcohol, the alleged risk of harm from defendants' conduct was plaintiff's injury as a result of her voluntary consumption of alcohol. Additionally, although the complaint alleges conduct other than the service of alcohol—in organizing, permitting, and supervising an event without adequate training; in pressuring plaintiff to attend; and in failing to warn her that she would be expected to consume excessive amounts of alcohol—the risk from the alleged negligence ultimately depends on the service of alcohol and plaintiff's voluntary consumption of it. Adhering to the reasoning of *Schutz*, we conclude that the legislature did not intend, while granting immunity to servers or other hosts from harm caused by a plaintiff's voluntary consumption of alcohol, to nonetheless remove that immunity for claims alleging negligence preceding that voluntary consumption. Here, defendants were social hosts who served plaintiff alcohol, and plaintiff voluntarily consumed alcohol and became intoxicated, injuring herself as a result. Although the allegations of the complaint describe conduct that preceded the event at La Costita, plaintiff's injuries arose out of the defendants' service of alcohol and plaintiff's voluntary intoxication. We agree with the trial court that plaintiff's claims are barred by ORS 471.565(1).

Because we conclude that the immunity provided by ORS 471.565(1) extends to the facts of this case, we consider plaintiff's contention that, as so construed, ORS 471.565(1) violates Article I, sections 10 and 17. We addressed and rejected that argument in *Schutz*, but we agree with plaintiff that the question is properly before us again in light of *Horton v. OHSU*, 359 Or 168, 376 P3d 998 (2016), in which the Supreme Court overruled in part its earlier opinion in

Smothers v. Gresham Transfer, Inc., 332 Or 83, 23 P3d 333 (2001), on which we relied in *Schutz*.

In *Horton*, the court described the proper analysis under the remedy clause of Article I, section 10, as established by the court's remedy clause jurisprudence predating *Smothers*. The court disavowed the bright-line rule it had drawn in *Smothers*, which *Horton* described as requiring a remedy for "all injuries for which common-law causes of action existed in 1857" but giving "no protection" to "injuries for which no cause of action existed in 1857." 359 Or at 220. Under *Horton*, instead of looking to the common law as it existed in 1857, the remedy-clause analysis focuses on the effect of legislation on the common law as it existed when the legislature acted, taking into account how the common-law may have changed over time "to meet the changing needs of the state." *Id.* at 218. Thus, it is the common-law causes of action and remedies that exist *at the time legislation is enacted* that provide the "baseline for measuring the extent to which [that] legislation conforms to the basic principles of the remedy clause—ensuring the availability of a remedy for persons injured in their person, property, and reputation." *Id.*

In applying that understanding of *Horton* to this case, our first inquiry is whether, when ORS 471.565 was enacted in 2001, the common law recognized a cause of action and remedy for injuries caused by the type of conduct alleged against defendants: with respect to defendant O'Brien, individually, negligence in organizing and pressuring plaintiff to attend an event where excessive amounts of alcohol would be served and consumed, and failing to warn plaintiff that excessive alcoholic beverages would be served and expected to be consumed; with respect to defendant O'Brien Constructors, vicarious liability for defendant O'Brien's negligence as well as direct liability for negligence in the training and supervision of O'Brien.

We conclude that, before the enactment of ORS 471.565, both of the alleged claims would have been cognizable under general common-law negligence principles, and defendants have not argued to the contrary. *See Vaughn v. First Transit, Inc.*, 346 Or 128, 137-38, 138 n 7, 206 P3d

181 (2009) (stating that a principal can be vicariously liable for an agent's negligence as well as directly liable for its own negligence in hiring, instructing, or supervising the agent); *Fazzolari v. Portland School Dist. No. 1J,* 303 Or 1, 17, 734 P2d 1326 (1987) ("[U]nless the parties invoke a status, a relationship, or a particular standard of conduct that creates, defines, or limits the defendant's duty, the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff."); *see also* *Scheffel v. Oregon Beta Chapter of Phi Kappa Psi*, 273 Or App 390, 401, 359 P3d 436 (2015) (same).

Given our interpretation of the statute here and in *Schutz*, ORS 471.565(1) eliminates those previously cognizable claims, for which plaintiff could have sought a remedy.[4] In considering whether ORS 471.565(1) nonetheless can survive plaintiff's remedy-clause challenge, *Horton* directs us to evaluate "the extent to which the legislature has departed from the common-law model measured against its reasons for doing so." *Id.* at 220. As part of that evaluation, *Horton* suggests, it is useful to determine whether the challenged legislation falls within any of three categories of legislation that may have remedy-clause implications: (1) legislation that did not alter the common-law duty but denies or limits the remedy a person injured as a result of that breach of duty may recover; (2) legislation that sought to adjust a person's rights and remedies as part of a larger statutory scheme that extends benefits to some while limiting benefits to others (a *quid pro quo*); (3) legislation that modified common-law duties or eliminated a common-law cause of action when the premises underlying those duties and causes of action have changed. *Id.* at 219.

---

[4] Contrary to defendants' contention, the fact that such claims might, at an earlier time, have been barred by contributory negligence is of no consequence to the analysis as to whether the claims existed at the time the legislature enacted ORS 471.565; at that time, contributory negligence would not have barred the claims. Rather, under Oregon's comparative-fault scheme, *see* ORS 31.600 ("Contributory negligence shall not bar recovery in an action * * * if the fault attributable to the claimant was not greater than the combined fault of all persons[.]"), the relative fault of the parties would be a matter for the trier of fact to weigh in its apportionment of responsibility for the plaintiff's injuries. *Fulmer*, 330 Or at 427.

The legislative history of ORS 471.565 reveals that the statute is of the first type. The statute was not enacted as a part of a larger scheme or *quid pro quo* in which benefits were extended to some, while limited to others. Nor does the legislative history show that common-law duties were eliminated because "the premises underlying those duties and causes of action have changed" such that the legislature permissibly could conclude that those interests no longer require the protection formerly afforded to them. *Horton*, 359 Or at 219-20. Indeed, the statute's text does not alter the common-law "duty" of a server not to provide alcohol to a visibly intoxicated person; it simply eliminates the claim against the server of a person who is injured by the person's own voluntary consumption of alcohol. Claims by third parties who are injured by the service of alcohol to visibly intoxicated persons remain viable. *See, e.g.*, *Baker v. Croslin*, 359 Or 147, 376 P3d 267 (2016).[5] The legislative history of ORS 471.565 is consistent with that understanding. When, at a hearing of the House Judiciary Committee, Representative Vicki Walker asked whether "there would be no liability on the part of the bartender to stop serving you alcohol at some point," Representative Lane Shetterly replied:

> "I would bet that in most cases this is not a problem, because I would expect that the bar owner is going to be a lot more concerned about your risk of harm to * * * third persons. So this is not going to * * * create an incentive for bar owners to serve people in an intoxicated state.
>
> "REPRESENTATIVE V. WALKER: Right.
>
> "REPRESENTATIVE SHETTERLY: And clearly it's not, because the greater risk is they're going to go out and hurt somebody else, in which case then *the bar owner is still liable*."

Tape Recording, House Committee on Judiciary, SB 925A, May 23, 2001, Tape 69, Side A (emphasis added). The legislative history shows that the intention was not to eliminate the obligation of servers and social hosts not to serve visibly intoxicated persons.

---

[5] Additionally, we note that service of alcohol to a visibly intoxicated person is a Class A misdemeanor. *See* ORS 471.410 (describing misdemeanor offense for serving or making alcoholic beverages available to a visibly intoxicated person).

Rather, the legislative history shows that the statute was proposed by the Oregon Restaurant Association to overrule *Fulmer*, and that the legislature enacted it to eliminate the common-law claim of a voluntarily intoxicated person—no matter what the specification of negligence, so long as the injury ultimately was caused by voluntary intoxication—based on the rationale that there should be "some element of personal responsibility for damages that you cause to yourself through your own voluntary intoxication." Tape Recording, House Committee on Judiciary, SB 925A, May 23, 2001, Tape 69, Side A (statement of Rep Lane Shetterly). As we said in *Schutz*, that history indicates "a legislative understanding that the statute would bar claims against alcohol servers by intoxicated patrons who injure themselves as a result of their own actions." 256 Or App at 582. In legislation of that category—in which a common-law duty is not eliminated, but an injured person is denied a remedy for breach of that duty—the court in *Horton* said, "[O]ur cases have held that the complete denial of a remedy violates the remedy clause." 359 Or at 219. We conclude that ORS 471.565 is unconstitutional because it falls within a category of legislation that the remedy clause prohibits and that the trial court therefore erred in granting defendants' motion for summary judgment based on the statute.

To avoid summary judgment on a negligence claim, the plaintiff must show the existence of a factual question on all dispositive issues framed by the defendant's motion. ORCP 47 C; *Two Two v. Fujitec America, Inc.*, 355 Or 319, 326, 325 P3d 707 (2014). Because the trial court concluded that plaintiff's claims were barred by ORS 471.565 and were not protected by Article I, section 10, and granted summary judgment to defendants on that ground, the court did not address defendants' argument that they are entitled to summary judgment because of a lack of evidence supporting plaintiffs' claims. The court will have the opportunity to consider that question on remand.

Reversed and remanded.