

No. 49366-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NICHOLAS MORTENSEN, an individual,

Appellant,

v.

DREW JAMES CORPORATION, d/b/a Main Street Bar & Grill, a for
profit corporation, and GUITRON ESTRADA, II, INC., d/b/a
Rancho Viejo Sports Bar, a for profit corporation,

Respondents,

and

ROBERT MORAVEC, an individual; and
JOHN/JANE DOES 1-99 including Bartenders,

Defendants.

CONSOLIDATED REPLY BRIEF OF APPELLANT

David Brown, WSBA #39810
Matthew Conner, WSBA #47733
Brett McCandlis Brown
1310 10th Street, Suite 104
Bellingham, WA 98225
(360) 714-0900

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellant
Nicholas Mortensen

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. REPLY ON STATEMENT OF THE CASE	1
C. SUMMARY OF ARGUMENT	6
D. ARGUMENT	7
(1) <u>The Bars Had a Duty Under the Relevant Restatement Test, and <i>Christen</i> Only Absolves Bars as a Matter of Law If the Harm in Question Was Intentional, Not Negligent and Accidental</u>	7
(a) <u>The Specific Notice Rule Does Not Apply; the <i>Christen</i> Court Drew a Critical Distinction Between Intentional and Unintentional Acts</u>	8
(b) <u>There Is No Logical or Policy Basis for Distinguishing the Foreseeability of Negligently Paralyzing Someone Using a Car from Negligently Paralyzing Someone Using a Gun</u>	14
(c) <u>Foreseeability Is a Question of Fact; Summary Judgment Was Inappropriate When Reasonable Minds Could Differ</u>	18
(2) <u>Legislative Pronouncements and Actions With Respect to Guns and Alcohol Inform the Foreseeability Analysis</u>	20
E. CONCLUSION	22

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	8, 12, 13, 14
<i>Bernethy v. Walt Failor's, Inc.</i> , 97 Wn.2d 929, 653 P.2d 280 (1982).....	15
<i>Christen v. Lee</i> , 113 Wn.2d 479, 780 P.2d 1307 (1989).....	<i>passim</i>
<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	2
<i>Estate of Kelly By & Through Kelly v. Falin</i> , 127 Wn.2d 31, 896 P.2d 1245 (1995).....	12
<i>Maltman v. Sauer</i> , 84 Wn.2d 975, 530 P.2d 254 (1975)	19
<i>McLeod v. Grant County Sch. Dist. No. 128</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	18
<i>Mejia v. Erwin</i> , 45 Wn. App. 700, 726 P.2d 1032 (1986).....	16
<i>N.L. v. Bethel Sch. Dist.</i> , 186 Wn.2d 422, 378 P.3d 162 (2016).....	18
<i>Reynolds v. Hicks</i> , 134 Wn.2d 491, 951 P.2d 761 (1998)	19
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	19
<i>Shelby v. Keck</i> , 85 Wn.2d 911, 541 P.2d 365 (1975)	12
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	11
<i>State v. Eike</i> , 72 Wn.2d 760, 435 P.2d 680 (1967).....	10
<u>Federal Cases</u>	
<i>Laclede Steel Co. v. Silas Mason Co.</i> , 67 F. Supp. 751 (W.D. La. 1946).....	16
<u>Other Cases</u>	
<i>Chapman v. Mayfield</i> , 361 P.3d 566 (Or. 2015).....	13
<i>Fuzie by Fuzie v. S. Haven Sch. Dist. No. 30</i> , 146 Misc. 2d 1006, 553 N.Y.S.2d 961 (N.Y. Sup. Ct. 1990), <i>aff'd</i> , 176 A.D.2d 856, 575 N.Y.S.2d 451 (N.Y. App. Div. 1991)	16
<i>Jacoves v. United Merch. Corp.</i> , 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468 (1992)	16

<i>Republic Vanguard Ins. Co. v. Buehl</i> , 204 N.W.2d 426 (Minn. 1973).....	16
<i>Thomas v. Atl. Associates, Inc.</i> , 226 So. 2d 100 (Fla. 1969)	16

Statutes

Laws of 2017, ch. 3, § 1	15
RCW 9.41.300(1)(d)	15
RCW 9A.08.010.....	10
RCW 9A.36.031(d).....	5
RCW 46.61.520	10
RCW 46.61.522	10
RCW 66.44.200	12, 13, 19
RCW 66.44.270	14

Constitutions

<i>U.S. Const.</i> , 2d amend.....	17
<i>Wash. Const.</i> art. I, § 24.....	17

Other Authorities

<i>Restatement (Second) of Torts</i> § 286 (1965).....	8, 19, 21
--	-----------

A. INTRODUCTION

Put simply, this case is about whether there is any cogent legal or logical distinction between the dangers of accidental gun injuries, as opposed to accidental automobile injuries, resulting from the negligent overservice of alcohol.

Nicholas Mortensen was profoundly and permanently injured when his friend, Robert Moravec, became so intoxicated from drinking at Main Street Bar and Grill (“Main”) and Rancho Viejo Sports Bar (“Rancho Viejo”) that he mishandled a loaded gun and it accidentally fired at Mortensen.

In the context of determining foreseeability as a matter of law, there is no functional difference between criminally negligent assault with a car, and criminally negligent assault with a gun. The trial court erred in dismissing Mortensens’ common law and statutory negligent overservice claims against the bars.

B. REPLY ON STATEMENT OF THE CASE¹

Mortensen’s statement of the case is thoroughly explained in his opening brief. It is not surprising that both bars attempt to paint the facts in the light most favorable to them. However, this Court is eminently

¹ Main Street’s Introduction section contains a lengthy and specific factual recitation that contains no citations to the record. Main Br. at 1-4. Mortensen replies only to factual assertions made in Main’s statement of the case, under the assumption that this Court will disregard such unsourced “factual” references.

aware that on appeal from summary judgment in the bars' favor, it must view the facts in the light most favorable to Mortensen, and any facts allegedly favoring the bars must be disregarded. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Main selectively discusses the record to paint Moravec's activities on the night of the incident as "typical," "normal," and not "distinctive." Main Br. at 6-11. Main cites one witness who did not "believe" that Moravec was intoxicated at Main. *Id.* at 8.

Main's self-serving factual recitation is inappropriate because it is *disputed*. Another eyewitness stated in no uncertain terms that Moravec was "obviously intoxicated" when he arrived at Main:

I arrived at Main Street Bar and Grill at approximately 8:30 p.m. Robert Moravec was obviously intoxicated when I arrived. I am 21 years old, have seen many intoxicated people and know when someone is drunk. His eyes were bloodshot and glassy, he was swaying slightly back and forth, and his voice was louder than was appropriate for the situation.

CP 24.

Main criticizes the statement that Mortensen and Moravec arrived at Main at around 5:00 p.m., and claims that both men stated they arrived much later. Main Br. at 6 n.8.

The suggestion that these facts are unsupported in the record is disingenuous. For example, the assertion that the party arrived at Main far

earlier than 8:30 is supported by Moravec's own testimony that he and Mortensen arrived "closer to four." CP 50. A credit card receipt from one of the group members with a time stamp of "16:13" or 4:13 p.m. CP 47. One of Mortensen's credit card receipts is time-stamped "17:37," or 5:37 p.m. *Id.*

Main also criticizes Mortensen claiming he has not supported the statement that the group stayed at Main from 8:30 p.m. to 1:00 a.m. and that Moravec consumed multiple and varied alcoholic drinks during that time. Main Br. at 6 n.8.

Again, the record contains ample facts to support Mortensen's timeline of activities. For example, Tyler Rua stated that the group was there from 8:30 until 1:00 a.m., and that he witnessed Moravec consume various kinds of alcohol:

Not long after I arrived at Main Street Bar and Grill and observed Robert Moravec's condition, I saw him served alcohol by the bartender at Main Street Bar and Grill Robert Moravec and I were both served and consumed "shots" of hard alcohol together. At the time Robert Moravec was served he was still obviously intoxicated. Our party stayed at Main Street Bar and Grill until approximately 1:00 am. During that time I observed Robert Moravec consume several more drinks provided to him by the bartender at Main Street Bar and Grill. Throughout this time Robert Moravec still appeared obviously intoxicated.

CP 24.

Rancho Viejo also cherry-picks the record – contrary to the summary judgment standard of review² – to suggest that it reflects Moravec drank only “one beer” at Rancho Viejo. Rancho Br. at 5. It bases this assertion on Moravec’s own statement. *Id.*

This Court should not be taken in by Rancho Viejo’s deceptive portrait of the record. When confronted on the “one beer” claim at his deposition, Moravec immediately recanted, stating he had “no idea, honestly,” how much he drank at Rancho Viejo. CP 52. Tyler Rua specifically declared that Moravec was served a “shot” of liquor and “several more alcoholic drinks” at Rancho Viejo:

As soon as we arrived at the El Rancho Viejo Sports Bar, Robert Moravec was served a “shot” of hard alcohol at the bar by the bartenders. Robert Moravec was served several more alcoholic drinks after that until closing time at approximately 2:00 a.m. He appeared obviously intoxicated throughout the time he was served alcohol at El Rancho Viejo Sports Bar.

CP 25.

The bars have *no answer* to the evidence adduced by Mortensen below that both bars were notorious in Clark County for chronically overserving bar patrons. Br. of Appellant at 4 n.1.

² Again, this Court must view the facts in the light most favorable to Mortensen, and the bars’ insistence on emphasizing only facts that they think exonerate their actions reflects their apparent ignorance, or fear of, that standard.

Both bars also deceptively suggest that the shooting of Mortensen was not accidental. Main Br. at 15 n.32; Rancho Br. at 3.³ They paint Moravec's actions as intentional, and not accidental. They assiduously avoid using the term "negligent" in connection with Moravec's conviction for criminally *negligent* assault, which is a glaring omission.

There is ample evidence in the record to support the statement that the shooting was accidental. It is reflected in witness statements and official reports. CP 210-13, 226. The search warrant affidavit stated the following: "In interviewing all parties involved, it appeared this was an *accidental* shooting with no intent to harm Mortensen." (emphasis added). CP 214. The very statute under which he was charged, RCW 9A.36.031(d) specifies that negligence, not intent, is the *mens rea* of the crime.

Main attempts to paint Mortensen as culpable in his own injuries. Main Br. at 11-13. It describes him as being intoxicated and "high" on "illegal drugs," including cocaine.

Main's unsubtle attempt at painting Mortensen as an irresponsible person who deserved to be permanently paralyzed by a gun accident is not consistent with viewing the record in the light most favorable to him, and

³ The accidental nature of the injuries is a *critical* material fact, perhaps the most critical in this case, as explained *infra* in the argument section.

is irrelevant to the legal issues on appeal.⁴

Rancho Viejo tries to minimize the pervasive and common incidence of gun injuries by claiming that because studies citing pervasive gun injuries do not specify that they occurred in Clark County, they do not constitute evidence of the foreseeability of alcohol-related gun accidents in the area where the bars are located. Rancho Br. at 4.

Rancho Viejo below did not counter Mortensen's evidence of gun saturation with any competing evidence. Nor did Rancho Viejo offer any factual basis for assuming that Clark County is exempt from the general incidence of accidental gun deaths that plague Washington. Foreseeability of car accidents is not analyzed on a county-by-county or city-by-city basis.

C. SUMMARY OF ARGUMENT

Instead of analyzing the facts here under the applicable legal test, both bars rely almost exclusively on one case, *Christen v. Lee*, 113 Wn.2d 479, 780 P.2d 1307 (1989). They claim it renders the accidental injuries to Mortensen unforeseeable as a matter of law because Moravec was convicted of "criminal assault" regardless of whether the assault was negligent or intentional.

⁴ As explained *infra*, the bars attempt to prejudice this Court against Mortensen by painting him as an irresponsible, belligerent criminal who has only himself to blame for his permanent paralysis.

However, the fulcrum of the *Christen* overservice foreseeability analysis is whether the act causing injury is intentional or accidental, not whether the intoxicated injuring party is held criminally liable. If criminality of conduct, rather than intentionality were the key, then bars would not be held liable for overserving the driver of a car who later is convicted of vehicular assault.

There is no legal, logical, or policy justification for distinguishing between accidental injuries caused by cars or accidental injuries caused by guns. These two instrumentalities are both inherently dangerous, pervasive, and common societal tools that are rendered more likely to cause accidental injury when in the hands of one who has been overserved alcohol.

Summary judgment here was inappropriate because a jury, not a court, must weigh the facts and render a verdict on whether the gun accident that profoundly and permanently injured Mortensen was foreseeable.

D. ARGUMENT

- (1) The Bars Had a Duty Under the Relevant Restatement Test, and *Christen* Only Absolves Bars as a Matter of Law If the Harm in Question Was Intentional, Not Negligent and Accidental

Mortensen argued in his opening brief that applying the four-part test from the *Restatement (Second) of Torts* § 286 (1965), summary judgment was improper because the bars owed him a duty to avoid the overservice that led to his injuries. Br. of Appellant at 15-18. He noted that it is undisputed the bars had a common law and statutory duty to avoid overservice to an obviously intoxicated person. *Id.* He averred that whether the duty extends to Mortensen is a question of foreseeability, a classic fact issue for the jury. *Id.*

(a) The Specific Notice Rule Does Not Apply; the Christen Court Drew a Critical Distinction Between Intentional and Unintentional Acts

Neither bar directly examines nor contradicts Mortensen's opening brief analysis of the elements of *Restatement* § 286. Again, under that test, a court must analyze whether the Legislature intended the statute "(a) to protect a class of persons which includes the one whose interest is invaded, (b) to protect the particular interest which is invaded, (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004).

Instead, both bars argue repeatedly and extensively (although not contiguously in their briefing) that under case law, they had no duty to

prevent a “criminal assault” unless they had “specific notice” that Moravec had dangerous propensities. Main Br. at 18-21, 26-35, 38-40; Rancho Br. at 11-29. They both rely heavily on *Christen*. They also cite *Barrett*, but only they view it as reaffirming *Christen*. Main Br. at 18-21, 26-35, 41-44; Rancho Br. at 11-15. They argue that under *Christen*, they would only be liable if they had “specific notice” that Moravec might later negligently assault Mortensen with a gun. *Id.*

Contrary to what the bars suggest, the *Christen* duty analysis hinges on the difference between intentional and unintentional acts, not whether the label of “criminal assault” applies to the act at issue. *Christen*, 113 Wn.2d at 495-96. The Court explained that while “driver error” is commonly understood as a risk of overintoxication, the act at issue in *Christen* was intentional and therefore “drastically different.” *Id.*

Critically, the *Christen* court clarified in a footnote that a criminal assault *can* be unintentional, but found it “sufficient for our purposes that according to the record before us in this *civil* action, it is *uncontroverted* that Mr. Coates *ran after* Mr. Long and stabbed him *twice* in the back.” *Id.* n.37. Thus, the *Christen* opinion does not foreclose the possibility that a negligent criminal assault by mishandling a handgun would be foreseeable.

In fact, a driver who commits the kind of “error” the *Christen* court identifies – injuring others with a car while intoxicated – can just as easily be convicted of criminally negligent homicide as a gun owner who makes a negligent “error” with a gun. RCW 9A.08.010 (defining criminal negligence); RCW 46.61.520, .522 (defining vehicular assault and vehicular homicide); *State v. Eike*, 72 Wn.2d 760, 762, 435 P.2d 680 (1967).

The bars’ argument, if accepted, would excuse them from their overservice if an intoxicated driver were convicted of criminally negligent homicide with a motor vehicle, unless the staff *knew* that the intoxicated patron was about to get into a car and hurt someone with it. This is not consistent with drunk driver overservice cases, where the criminal status of the driver is irrelevant.

Nothing in the *Christen* analysis affords the bars two different standards of duty based on whether their patron commit criminally negligent acts with a gun as opposed to a car. If it did, then overservice of criminally negligent drunk drivers would be excused in the case law, while overservice of civilly negligent drunk drivers would not. There is no foundation for the bars’ illogical conclusion.

This Court should not be misled by the bars’ deceptive attempts to blur this line drawn in *Christen* between intentional and unintentional

acts.⁵ For example, in a misleading footnote, Rancho Viejo claims that “in *Christen*, the assailant was too drunk to form an intent to harm and like Moravec was convicted of assault in the third-degree.” Rancho Br. at 20 n.6. In another misleading statement, Rancho Viejo claims that “[i]n overservice cases...whether that assault is characterized as intentional, reckless, or negligent...[the] plaintiff must prove that the defendant had notice that the assault might occur...”, citing *Christen*. Rancho Br. at 29.

The *Christen* court makes no reference to Coates’ criminal status in its analysis of the specific notice issue. Nor does *Christen* stand for the proposition that all criminal assaults are intentional and *per se* subject to the “specific notice” analysis. In fact, the opinion states just the opposite. The Supreme Court explained that *unintentional* “driver error” is what distinguished *Christen* – a case the Court viewed as involving intentional action – from past cases where the establishment had a duty regardless of specific notice. *Christen*, 113 Wn.2d at 496.

The factual fulcrum for the duty analysis in *Christen* is not whether a “criminal assault” occurred, but whether the act at issue was intentional or unintentional. *Christen*, 113 Wn.2d at 495-96. If the act is

⁵ Misleadingly, Rancho Viejo does not cite the *Christen* opinion itself for the claim that the assailant in *Christen* was “too drunk to form an intent to harm,” but instead cites *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64, 65 (1987), the criminal appeal filed by Steven Coates, the same person who was also the assailant in the companion *civil* case to *Christen*. Rancho Br. at 20 n.6. The *Coates* criminal opinion contains no holding or finding holding that Coates was “unable to form intent” as an element of the offense.

unintentional, like “driver error,” then under *Christen* traditional duty principles involving foreseeable negligence should apply.

Barrett is also unavailing to the bars on the question of the duty they owed to Mortensen. It does not hold, as Rancho Viejo avers, that the “apparently intoxicated” standard applies *only* in drunk driving cases” and therefore *not* to “assault” cases” as a matter of law. Rancho Br. at 12 (emphasis in original). Instead, *Barrett* simply clarified that RCW 66.44.200 established the standard of civil liability in an overservice case involving drunk driving. *Barrett*, 152 Wn.2d at 273-74. The statute itself makes no reference to automobiles, driving, or the like.

Both bars also argue that *Estate of Kelly By & Through Kelly v. Falin*, 127 Wn.2d 31, 896 P.2d 1245 (1995) and *Shelby v. Keck*, 85 Wn.2d 911, 541 P.2d 365 (1975) support their position on duty. Main Br. at 21-25, 41-44; Rancho Br. at 15-20.

Kelly and *Shelby* are inapposite and do not inform the analysis here. *Kelly* is a case involving injury to the intoxicated person, not injury to a third party. *Kelly*, 117 Wn.2d at 33. In *Shelby*, our Supreme Court affirmed that in a common law premises liability case, the tavern owner had to have some notice of a dangerous situation before incurring a duty to protect patrons. *Shelby*, 85 Wn.2d at 914. The undisputed facts of *Shelby* showed that no overservice occurred; there was no evidence that the

patron was obviously intoxicated or had been served large quantities of alcohol. *Id.* at 912. Neither case contravenes the proposition that where the establishment itself acts negligently by serving excessive alcohol and a third party is injured, the statutory overservice standard applies. RCW 66.44.200.

Both bars also contend that *Chapman v. Mayfield*, 361 P.3d 566 (Or. 2015), an Oregon case, should control here. Main Br. at 30; Rancho Br. at 26-27. This Oregon case does not control, and is also unpersuasive. That court's decision was predicated upon Oregon common law principles that are distinct from the common law/statutory duty owed by commercial alcohol providers in Washington.

Main relies on the assertion that because Mortensen was also drinking, he is not an "innocent bystander" as that term is used in *Barrett*. Main Br. at 41. It describes Mortensen as culpable in his own shooting and permanent paralysis because he was "an active, intoxicated, adult participant in the events that culminated in his injury." *Id.* at 42. In contrast, it describes the vehicle occupants in *Barrett* as sober and virtuous persons who, unlike Mortensen, did not deserve to be injured. *Id.* at 41.

Main misapprehends the term "innocent bystander" as it is used in *Barrett*. It does not refer to the moral uprightness or virtue of a victim, but instead distinguishes third party victims of those who are overserved from

first parties who themselves are overserved. *Barrett*, 152 Wn.2d at 271 (distinguishing the drunk driver himself from the “innocent bystander” hit by a drunk driver). First parties who are overserved cannot seek redress in a tort action under RCW 66.44.270, but third parties who are their victims can. *Id.* Even if the bars believe that Mortensen deserved to be shot or was culpable because of his intoxication, that argument speaks to comparative fault, not the bars’ duty.

Here, there was ample evidence that Moravec was highly intoxicated, but the bars, nevertheless, continued to serve him copious quantities of alcohol. CP 24-25, 28, 47, 50-52, 175-77, 411, 464, 467-68. He negligently and unintentionally injured his friend by mishandling the gun while intoxicated. CP 483-84, 487, 490, 493, 496, 499, 560, 562. He was convicted of criminally *negligent* assault, not intentional, assault. CP 758-72.

The specific notice rule does not excuse the bars any more than it would excuse them if Moravec had committed criminally negligent vehicular assault or homicide. Both are foreseeable, and the bars’ duty should apply with equal force in both situations.

- (b) There Is No Logical or Policy Basis for Distinguishing the Foreseeability of Negligently Paralyzing Someone Using a Car from Negligently Paralyzing Someone Using a Gun

Both bars admit that our courts have concluded it is eminently foreseeable that an intoxicated person might negligently injure someone with a car. Main Br. at 36-38; Rancho Br. at 20-21. However, both bars argue that as a matter of law, it is unforeseeable that an intoxicated person might negligently injure someone with a gun. *Id.* They also both argue, essentially, that comparing gun ownership and accidental gun death rates to automobile ownership and death rates is irrelevant to the analysis. *Id.* For example, Main argues that it is “fatuous” to find similarity between guns and cars for the purposes of evaluating a party’s legal responsibilities. Main Br. at 37. Main also argues that one should not compare the foreseeability of gun accidents and car accidents because guns are “a menace” and cars are “benign.” Main Br. at 37.

There is nothing “fatuous” or illogical about finding similarities between firearms and automobiles for the purposes of examining a legal duty. In the negligent entrustment context, Washington law categorizes the two as exactly the same.⁶ *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d

⁶ *Christen*, 113 Wn.2d at 499, reaffirmed *Bernethy*. Although the *Christen* court said that the distinction between negligent entrustment and overservice of alcohol cases is “obvious,” without elaborating, *id.*, *Christen* involved a knife, which is not classified as an inherently dangerous instrumentality like a firearm. Also, the people of Washington specifically identified the combination of guns and alcohol as dangerous, just as the Legislature has identified the combination of automobiles and alcohol. RCW 9.41.300(1)(d); Laws of 2017, ch. 3, § 1. The Supreme Court has not opined on the similarity between automobiles and guns or the foreseeability of automobile accidents versus gun accidents in the overservice context.

929, 653 P.2d 280 (1982); *Mejia v. Erwin*, 45 Wn. App. 700, 704, 726 P.2d 1032, 1034 (1986).

Washington is not an outlier. Many states' negligent entrustment laws apply the exact same duty of care regarding the provision or operation of cars and guns both categorized as "dangerous instrumentalities." See, e.g., *Jacoves v. United Merch. Corp.*, 9 Cal. App. 4th 88, 116, 11 Cal. Rptr. 2d 468 (1992) (equating the duty to avoid entrusting the "dangerous instrumentality" of a gun to the "dangerous instrumentality" of a car); *Thomas v. Atl. Associates, Inc.*, 226 So. 2d 100 (Fla. 1969) ("Almost fifty years ago we extended to the operation of automobiles the dangerous instrumentality doctrine already applied in the law of master and servant and principal and agent to such dangerous agencies as ... loaded firearms..."); *Laclede Steel Co. v. Silas Mason Co.*, 67 F. Supp. 751, 754 (W.D. La. 1946) (acknowledging that in consumer protection context "most jurisdictions" equate firearms and automobiles as inherently dangerous); *Republic Vanguard Ins. Co. v. Buehl*, 204 N.W.2d 426, 428-29 (Minn. 1973) (recognizing availability of claim for negligent entrustment in cases involving both firearms and automobiles); *Fuzie by Fuzie v. S. Haven Sch. Dist. No. 30*, 146 Misc. 2d 1006, 1009, 553 N.Y.S.2d 961 (N.Y. Sup. Ct. 1990), *aff'd*, 176 A.D.2d 856, 575 N.Y.S.2d 451 (N.Y. App. Div. 1991) ("BB guns and automobiles" may be

characterized as dangerous in the hands of a minor).

Even assuming guns are more dangerous and cars are “benign,” it is unclear how this is an argument *against* foreseeability of their propensity to injure when used by an intoxicated person. If anything, the claim that guns have only one dangerous purpose is an argument that injury from their use by an intoxicated person is *more* foreseeable than injury from use of a car by an intoxicated person.

Nor does the fact that cars are common tools that are owned by many people distinguish them from guns. The bars’ attempts to categorize guns as nothing but murder weapons owned only by nefarious or socially deviant persons demonstrates a profound ignorance of the legal and social prevalence of guns and differing views of their usefulness. *U.S. Const.*, 2d amend.; *Wash. Const.* art. I, § 24.

Main makes the specious argument that “a tavern keeper is not required to inquire whether his patron has guns and ammo at home, or warn him to stay away from them...”. Main Br. at 36.

Reversing summary judgment will not result in any parade of horrors or force the bars to inquire into their patrons’ lives.⁷ These establishments currently have liability for overserving patrons if they

⁷ Suggesting that bartenders would become interrogators of their customers is the kind of argument designed to inflame the passions of those who view the imposition of social and legal responsibility as unduly burdensome government interference rather than benefiting the health and safety of citizens.

injure someone with a car, yet no one suggests that a “tavern keeper” has a duty inquire whether their patrons own cars. Such inquiry is legally irrelevant. In fact, even if they *knew for a fact* that a particular patron did not own a car, the bars would not escape liability if an overserved customer injured someone in a borrowed car.

(c) Foreseeability Is a Question of Fact; Summary Judgment Was Inappropriate When Reasonable Minds Could Differ

Both bars argue that they only had a duty to avoid “foreseeable” risks, and that Moravec’s negligence was unforeseeable as a matter of law. Main Br. at 21-25; Rancho Br. at 15-20. They repeatedly argue that no Washington court has ever held a bar owner liable for injuries in these specific circumstances, thus Mortensen’s claims were properly dismissed on summary judgment because reasonable minds could not differ regarding foreseeability.

Ordinarily, foreseeability is a question of fact for the jury; it is only resolvable as a matter of law if the circumstances of the injury “are so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 429-30, 378 P.3d 162 (2016). “[T]he harm sustained must be reasonably perceived as being within the general field of danger covered by the

specific duty owed by the defendant.” *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). *See also, Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975); *Reynolds v. Hicks*, 134 Wn.2d 491, 951 P.2d 761 (1998).

Reasonable minds could differ regarding whether gun accidents are any less a foreseeable consequence of overservice of alcohol than car accidents. Neither the prevalence nor dangerous qualities of guns are seriously disputed by the bars. Cars are common tools and guns are both commonly owned, but inherently dangerous, tools. The safe operation of cars and guns is greatly affected by the sobriety of the operator. Not every bar patron can be presumed to own a gun, but it is equally true that not every bar patron can be presumed to own a car. Many people, particularly those living in urban areas with ample public transportation, do not own a car.

The fact that no Washington court has specifically addressed this issue is an argument that summary judgment dismissal was *inappropriate*. A jury must weigh the facts and evidence and decide whether, under Washington law as reflected in RCW 66.44.200 and *Restatement* § 286, a gun accident is a reasonably foreseeable consequence of overservice of alcohol.

(2) Legislative Pronouncements and Actions With Respect to Guns and Alcohol Inform the Foreseeability Analysis

In his opening brief, Mortensen argued that the Legislature's increasing concern with preventing the combination of alcohol and firearms informs the foreseeability analysis. Br. of Appellant at 27-30. He explained that increasingly, both public health organizations and other public agencies, including the Legislature and the citizens of Washington, have recognized the danger that alcohol consumption and impairment therefrom results in injuries and deaths from gun accidents. *Id.*

Rancho Viejo responds that public policy has no place in this Court's reasoning. CP 31. It says that such considerations should be left to the Legislature. However, both bars themselves actually insist that public policy does play a role, but that the prevailing public policy is "personal responsibility" rather than "paternalism." Main Br. at 44; Rancho Br. at 31 n.13. Both bars *ignore* the fact that the *people of Washington* have forcefully expressed the public policy against gun violence in Initiative 1491 only last year. Laws of 2017, ch. 3. In that legislation, the people acted "to reduce gun deaths and injuries, while respecting constitutional rights" by establishing a procedure to remove guns from persons who pose a danger to themselves or others. *Id.* at § 1(5).

To be clear, Mortensen is not arguing that this Court should make public policy decisions in the place of the Legislature. This is a red herring. Under the fourth element of the *Restatement* § 286 test, such legislative and agency pronouncements inform whether the statute at issue protects a persons' interest against the particular hazard from which the harm results. *Id.*

Given the increased public awareness of the dangers of guns and alcohol, accidental gun injuries could reasonably be viewed as a hazard from which those injured should be protected.

The notion that our court should find it “paternalistic” to hold the purveyors of alcohol responsible for the resulting accidental gun injuries could be equally true of the resulting accidental automobile injuries. Yet our courts have consistently concluded that the dangers of automobiles and alcohol is important enough to impose that liability. Thus, the proper analysis is not paternalism versus freedom, but whether there is any coherent rationale for treating guns as different from automobiles.

In an interesting twist, the bars' insistence that gun accidents are unforeseeable conflicts with their claims that imposing liability for gun accidents would be a “broad” exception to their non-liability. *Rancho Br.* at 31. If gun accidents resulting from overservice of alcohol are so rare and bizarre as to be unforeseeable as a matter of law, one wonders why the

bars believe that imposing liability would greatly increase their legal peril.

E. CONCLUSION

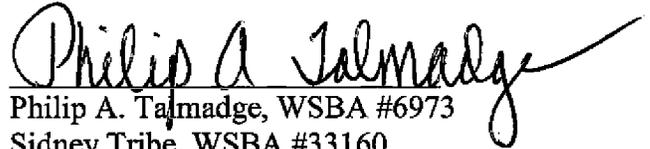
The bars' reliance on *Christen* to absolve them of liability as a matter of law is based on a misreading of that case. They have an obligation not to serve patrons like Moravec who are apparently under the influence. As for the scope of the bars' common law or statutory duty, that foreseeability issue was for a jury.

Simply put, there is no rational reason why a bar that overserves an adult patron who is apparently under the influence may be liable if that patron goes out and kills or injures others with a motor vehicle, but is not liable as a matter of law if the instrumentality of the harm to third persons is a firearm.

This Court should reverse the trial court's duty decisions and direct that summary judgment be entered in Mortensen's favor and against the bars on the issue of duty. Costs on appeal should be awarded to Mortensen.

DATED this ~~31~~³¹ day of May, 2017.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

David Brown, WSBA #39810
Matthew Conner, WSBA #47733
Brett McCandlis Brown
1310 10th Street, Suite 104
Bellingham, WA 98225
(360) 714-0900

Attorneys for Appellant
Nicholas Mortensen

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Consolidated Reply Brief of Appellant* in Court of Appeals, Division II Cause No. 49366-7-II to the following:

David Brown, WSBA #39810

Matthew Conner, WSBA #47733

Brett McCandlis Brown

1310 10th St. #104

Bellingham, WA 98225

Jay W. Beattie, WSBA #37160

Attorney at Law

1300 SW 5th Ave. #3400

Portland, OR 97201-5640

Gary A. Western, WSBA #12878

David M. Jacobi, WSBA #13524

Wilson Smith Cochran Dickerson

901 5th Ave. #1700

Seattle, WA 98164

Original E-filed with:

Court of Appeals, Division II

Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 31, 2017 at Seattle, Washington.



John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 31, 2017 - 10:44 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49366-7
Appellate Court Case Title: Nicholas Mortensen, v. Appellant v. Robert Moravec, et al, Respondents
Superior Court Case Number: 15-2-02763-1

The following documents have been uploaded:

- 4-493667_Briefs_20170531103932D2162275_5552.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Consolidated Reply Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- assistant@tal-fitzlaw.com
- dbrown@brettlaw.com
- jacobi@wscd.com
- jbeattie@lindsayhart.com
- ossenkop@wscd.com

Comments:

Consolidated Reply Brief of Appellant

Sender Name: John Paul Parikh - Email: johnpaul@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20170531103932D2162275