

Case No. 49366-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NICHOLAS MORTENSEN,
Appellant,

v.

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

ROBERT MORAVEC, an individual; and
JOHN/JANE DOES 1-99 including bartenders,
Defendants.

Appeal relating to Clark County Superior Court,
Case No. 15-2-02763-1 (Judge Bernard F. Veljacic)

**BRIEF OF RESPONDENT GUITRON ESTRADA, II, INC. dba
RANCHO VIEJO SPORTS BAR**

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I. INTRODUCTION

Pursuant to RAP 10(g) Guitron Estrada, II, Inc. *dba* Rancho Viejo Sports Bar (“Rancho Viejo”) adopts and incorporates the introduction, statement of the case and arguments made in the brief submitted by defendants James Drew Corporation *dba* Main Street Bar & Grill (“Main Street”) subject to the additional facts and arguments set forth in this brief.

In *Christen v. Lee*, 113 Wn.2d 479, 509, 780 P.2d 1307 (1989), the Washington Supreme Court held that a bar owner is not liable for a “criminal assault” committed by a patron who was served alcohol while obviously intoxicated because criminal assault is not foreseeable as a matter of law unless the bar owner was on notice that the patron might commit the assault based on his violent or aggressive behavior at the bar on the day of the injury or on prior occasions.

For 28 years, the Washington courts have faithfully applied the *Christen* rule, and the rule has not been undermined or varied in any way by subsequent legislation or administrative regulation. It remains entrenched Washington law. In this case, the trial court correctly concluded that plaintiff’s injuries resulted from a “criminal assault” perpetrated by plaintiff’s drinking companion, Robert Moravec, who shot plaintiff with a .45 caliber semi-automatic handgun at Moravec’s home miles away from Rancho Viejo. Plaintiff failed to produce any evidence

that Rancho Viejo was on notice that Moravec owned a gun or that he might become violent based on his behavior at the bar on the night of the injury or at any other time. Accordingly, the trial court correctly dismissed plaintiff's common law "over-service" claim against Rancho Viejo because plaintiff's injuries were not foreseeable as a matter of law.

II. RESPONSE TO ASSIGNMENT OF ERROR

A. *The trial court properly denied plaintiff's motion for summary judgment and granted defendants' cross-motions for summary judgment.*

B. *Issues Pertaining to Response to Assignment of Error.*

1. Did the trial court properly grant summary judgment and dismiss plaintiff's claims against Rancho Viejo, because it had no legal duty to protect plaintiff from a gunshot injury, which occurred after plaintiff and Moravec left the premises, and in Moravec's own home, when neither Moravec nor plaintiff, nor any of their friends carried a gun, indicated an intent to get a gun, or displayed any tendency toward aggression or violence while at the bar?

2. Did the trial court properly grant summary judgment and dismiss plaintiff's claims against Rancho Viejo, because Moravec's criminally reckless or negligent shooting of plaintiff was not a foreseeable result of serving alcoholic beverages to Moravec, as a matter of law, when there was no indication that he was armed or intended to

obtain a firearm or any other weapon to threaten or injure plaintiff or anyone, whether on the premises or after leaving the premises?

III. COUNTER STATEMENT OF THE CASE

Plaintiff asserts that “here, no criminal assault occurred.” Appellant’s Brief, p. 23. The record, however, shows that Moravec pointed a loaded .45 caliber semi-automatic handgun at plaintiff with the intent to scare him. Moravec intended to scare plaintiff so he would stop banging on his bedroom door and walls and disturbing him as he prepared to bed-down with a woman. CR 232-233. Moravec stepped out of his bedroom, pointed his gun at plaintiff, “slipped” the trigger and shot him. CP 258, 260.

Although Moravec may have thought the gun was unloaded, he pointed it directly at plaintiff with the hammer cocked and with the intent to scare him. That act alone amounted to a misdemeanor (RCW 9A.12.030) and when the gun went off, it became a felony. Moravec pled guilty to Assault in the Third Degree (RCW 9A.36.031(d)); he was convicted of that crime and served time in jail. CP 758.

Plaintiff also cites various studies available on the internet to show that accidental, alcohol-related shootings in King County are so prevalent as to be foreseeable by a bar owner in Clark County. Appellant’s Brief, p.

29-30.¹ Assuming that King County and Clark County are similar in terms of gun-related injuries and death, none of those studies ties a single gun-related injury or death to the use of alcohol. Indeed, the reports cited by plaintiff indicate that the vast majority of gun-related deaths were caused by suicide (68%) or homicide (29%). Gomez, *Firearm Violence in King County: A Look at the Data*, Seattle & King County Public Health (201) at p. 5.²

Plaintiff also submitted evidence in the trial court indicating the number of “firearms” *sold* in all Washington counties. CP 53-170. The raw numbers do not indicate how many guns remained in Clark County, how many of the guns were handguns or how many were involved in intentional or accidental shootings. These unexplained numbers certainly do not prove that Clark County is so saturated with handguns that bar owners in Battle Ground should foresee that intoxicated patrons will return home from drinking and shoot their social guests.

¹ To the extent these studies are offered as “evidence” of a connection between alcohol use and gun-related injury, they were not referenced below and cannot be considered by this court on appeal. RAP 9.12.

² <http://www.kingcounty.gov/depts/health/violence-injury-prevention/violence-prevention/gun-violence/LOK-IT-UP/~media/depts/health/violence-injury-prevention/documents/firearm-violence-king-county-2014.ashx>. (Last visited 03/29/2017).

As for Moravec's conduct on the night of the shooting, he testified in his deposition that he recalled drinking one beer at Rancho Viejo. CP 52, 268. There are no credit card receipts or other documentary evidence in the record indicating that he purchased any beer or hard liquor at the bar. The police detective who investigated the shooting reviewed the security video from Rancho Viejo which showed Moravec "walking around" the bar. CP 564, 566. In his opinion, Moravec did not appear to be intoxicated. *Id.* The evidence in the record also indicates that Moravec was in a "good mood"; he did not display an aggressive or combative behavior at Rancho Viejo (CP 323), and he was not carrying a gun. CP 255.

IV. ARGUMENT

A. *Standard of Review*

This court reviews *de novo* all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 661, 958 P.2d 301 (1998).

B. *Rancho Viejo did not owe a duty to plaintiff under the premises liability law.*

Plaintiff argues that the trial court erred in dismissing his claims against Rancho Viejo because his injuries foreseeably resulted from Rancho Viejo's breach of its duty as a bar owner to protect its guests from

criminal assaults by other guests. Appellant’s Brief at p.12; *see e.g.* Restatement (Second) Torts § 344 (duty of possessor of land to protect invitees from negligent *or* intentional acts of third-parties); *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015) (acknowledging that Restatement (Second) Torts § 344 is the law in Washington); *Shelby v. Keck*, 85 Wn.2d 911, 541 P.2d 365 (1975) (stating rule). The Restatement (Second) Torts § 344 provides in material part:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public *while they are upon the land for such a purpose*, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

(Emphasis added).

Here, plaintiff was shot in a private home *after* leaving Rancho Viejo. Under the Restatement (Second) Torts § 344 and Washington law, Rancho Viejo had no duty to protect plaintiff from risk of being shot *after* leaving the bar and while at the home of a drinking companion “two or

three” miles away. CP 312. *See also Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 233, 802 P.2d 1360, 1369 (1991) (“we hold that a possessor of land has no generalized duty to provide security measures on the premises so as to protect those off the premises, including passersby, from third party criminal activity on the premises.”); *Christen v. Lee*, 113 Wn.2d at 509 (recognizing that as a general rule a “duty of a drinking establishment to protect its patrons does not extend to harm occurring away from its premises”); *Johnson v. Martin*, 28 Wn. App. 774, 775, 626 P.2d 525 (1981) (drinking establishment not liable where assault occurred several minutes after the victim left the establishment).

Moreover, even if Rancho Viejo owed a duty to plaintiff to protect him from harm after leaving the bar (which it did not), that duty only extended to protecting him from harms that were reasonably foreseeable. *Shelby v. Keck*, 85 Wn.2d at 915. In *Shelby*, a guest entered a bar with a loaded revolver in a shoulder holster. He had been asked to leave the bar three weeks earlier because he was carrying a gun. After having two drinks and while attempting to unload the revolver under his table, it discharged, killing decedent. Decedent’s estate brought two claims against the bar – a claim for premises liability and a common-law “over-service” claim. The court affirmed the directed verdict on the over-service claim because there was no evidence that the guest was obviously

intoxicated at the time he was served. The court also affirmed the directed verdict on the premises liability claim because the evidence failed to establish the foreseeability of decedent's death:

[T]he [common law rule] holds the keeper of an establishment responsible for injury in only those instances where the threat of harm was reasonably foreseeable. Without further evidence which would alert a reasonable man in the defendant's position that Keck was likely to be armed and thereby posed a threat to the safety of his other patrons, the mere fact that he had once been instructed to leave the lounge due to the presence of a weapon is insufficient to require the defendant to conduct a "search" whenever Keck subsequently frequented the establishment. The record is completely void of any such evidence, and we therefore hold that the trial court did not err in directing a verdict in favor of the defendant, since the plaintiff failed to introduce sufficient evidence to establish a prima facie case in support of her claim.

Id. See also *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 53, 920 P.2d 241 (1996) (cataloguing premises liability cases where the Washington courts affirmed summary judgment or directed verdict based on the absence of evidence "sufficient to support a finding that a reasonable person would have foreseen an attack of the sort that took place.") As the court stated in *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d at 771-72 (involving a mass shooting in a shopping mall):

In order to establish a genuine issue of material fact concerning a landowner's obligation to protect business invitees from third party criminal conduct under the prior similar incidents test, a plaintiff must generally show a history of prior similar incidents on the business premises within the prior experience of the possessor of the land.

We reject a broad notice rule requiring a landowner to protect business invitees from third party criminal conduct. We recognize the wisdom of the Supreme Court of Michigan when it stated:

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable

for the criminal acts of third parties.

MacDonald v. PKT, Inc., 464 Mich. 322, 335, 628 N.W.2d 33 (2001).

Id.

In both *Shelby* and *McKown*, the court rejected a “broad notice rule” imposing liability on a business owner merely because gun-related assaults were “invariably foreseeable everywhere.” *Id.* In *Shelby*, the negligent shooting of a guest was *not* foreseeable absent evidence that the bar had notice that the other guest “was likely to be armed and thereby posed a threat to the safety of [the deceased guest].” 85 Wn.2d at 915. In *McKown*, a mass shooting in a shopping mall was not foreseeable absent evidence that the mall owner had notice or knowledge based on past experience of “prior similar incidents,” meaning prior acts of violence that were similar in nature to the mass shooting that actually occurred. 182 Wn.2d at 771-72. *See also* Restatement (Second) Torts §344, *comment f.*³

³ f. Duty to police premises. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or
Footnote continued on next page.

Here, plaintiff failed to offer any evidence that Rancho Viejo had notice or knowledge that Moravec was “likely to be armed and thereby posed a threat to the safety of [its] other patrons.” *Shelby v. Keck*, 85 Wn.2d at 915. Plaintiff similarly failed to offer any evidence that Rancho Viejo had notice or knowledge based on its “past experience” that Moravec or any other person might shoot plaintiff under circumstances similar to those that resulted in plaintiff’s injury. Rancho Viejo had no duty to protect plaintiff from physical harm after leaving the bar, but even if it did, Rancho Viejo had no duty to protect him from being shot by a person who it did not know owned a gun, who was not known to be violent and who gave no indication while drinking at the bar that he might shoot plaintiff in a private home miles away.

C. *Rancho Viejo did not owe a duty to plaintiff under RCW 66.44.200.*

Plaintiff next argues that Rancho Viejo had an “additional” statutory duty under RCW 66.44.200(1) not to serve a patron who was “apparently under the influence of liquor” (“apparently intoxicated”). In *Christen v. Lee*, the court rejected the identical argument, holding that the

criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

“apparently intoxicated” standard in RCW 66.44.200(1) did not apply in cases arising out of criminal assaults. *Id.* 113 Wn.2d at 503. In *Christen*, an intoxicated patron left the defendant’s bar and stabbed an off-duty police officer. The officer contended that the drinking establishment was negligent *per se* under RCW 66.44.200(1) for serving an “apparently intoxicated” person. The court disagreed, concluding that the legislative purpose of RCW 66.44.200 was to protect against the foreseeable hazard of drunk drivers “and was not intended to protect against the hazard of a subsequent criminal assault.” *Id.* The court concluded that the “obviously intoxicated” standard applied to claims arising out of “criminal assaults.” *Id.*

The court in *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 269, 96 P.3d 386 (2004) similarly held that RCW 66.44.200(1) established the standard of “civil liability” in actions against bar owners brought by victims of drunk drivers. In other words, the “apparently intoxicated” standard applies *only* in drunk driving cases. *See e.g.* Washington Pattern Instruction (WPI) 370.01. There are no Washington courts decisions applying the “apparently intoxicated” standard to assault cases, regardless of whether the assault is characterized as intentional, reckless or negligent.

Moreover, the trial court dismissed plaintiff’s claims against Rancho Viejo because his injury was not foreseeable as a matter of law,

and in light of the disposition below, plaintiff fails to explain how application of the statutory “apparently intoxicated” standard would have any effect on the outcome here.

RCW 66.44.200(1) does not purport to create a new civil cause of action in favor of third-parties injured by the service of alcohol to “apparently intoxicated” patrons, and the Washington legislature has eliminated the doctrine of negligence per se based on the violation of a statute except in limited circumstances. *See* RCW 5.40.050. The “apparently intoxicated” standard is simply a standard of conduct applicable in common law over-service claims involving drunk-driving accidents and does not expand or contract the range of foreseeable injuries in over-service claims.

Significantly, the Restatement (Second) of Torts §286 provides that “[a] court *may* adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation” (emphasis added), and the *Barrett* court relied on that section in adopting RCW 66.44.200(1) as the standard of conduct applicable in common law over-service claims involving drunk driving accidents. *See e.g. Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d at 269. However, the *Barrett* court did *not* purport to create a new statutory claim for relief or expand the range of legally foreseeable injuries resulting from the over-

service of alcohol. *Id.* 152 Wn.2d at 274 (the statutory standard for civil liability did not “upset [any] established precedent.”) *See also Christen v. Lee*, 113 Wn.2d at 496. *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 990 P.2d 968 (2000) (although RCW 66.44.270(1) prohibited defendants from “permitting” minors to drink alcohol on their premises, statutory standard could not expand common-law duty which prohibited only “serving” alcohol to minors); *Schooley v. Pinch's Deli Mkt.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998) (“[E]ven if an alcohol vendor sells alcohol to a minor in violation of the law . . . [it] will be responsible only for the foreseeable consequences of its negligent sale of alcohol”).⁴

⁴ *See also Doe v. Bradley*, 58 A.3d 429, 453-54 (Del. Super. Ct. 2012):

Restatement Second § 286 . . . addresses when a statute might define the applicable “standard of conduct.” While sometimes confused, the concept of “standard of conduct [or care]” is fundamentally different from the concept of “duty.” Duty addresses the baseline question of whether a court may impose upon a defendant a legally enforceable obligation to act for the protection of another. The standard of care, on the other hand, addresses the standard by which the defendant's conduct should be measured after the court has determined that a duty exists.

Regardless of which standard applies – “obviously intoxicated” or “apparently intoxicated” – the foreseeability of an intentional or reckless criminal assault is governed by the same rules. As explained below, Rancho Viejo is not subject to liability for plaintiff’s injuries because Moravec’s criminal assault was not foreseeable as a matter of law.

D. *Mortenson was not “foreseeably injured” by defendants’ alleged over-service of Moravec.*

After the repeal of the Washington “Dramshop Act”⁵ in 1955, the Washington Supreme Court adopted the common law rule that “in the absence of statute, there can be no cause of action against one furnishing liquor in favor of those injured by the intoxication of the person so furnished.” *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 762-763, 458 P.2d 897 (1969) (stating rule). In *Halvorson*, the court held that an employer was not liable for injuries to a third-party arising out of a car accident caused by an employee who became intoxicated at a company Christmas party. The court stated in *dicta*, however, that there may be exceptions to the common law rule of non-liability where a *commercial vendor* serves a patron in a state of “helplessness or debauchery.” *Id.*

In *Shelby v. Keck*, decided six years later, the court echoed the *dicta* in *Halvorson* and cited various out-of-state cases holding that “an

⁵ Former RCW 4.24.100 (derived from Laws of 1905, ch. 62).

action is allowed at common law where liquor is sold to a person who is so intoxicated that he has been effectively deprived of his will power or responsibility for his actions.” *Id.* 85 Wn.2d. 916-17. The court further noted:

Those jurisdictions which have adopted this approach emphasize that it is based on common-law negligence, thereby requiring proof that the seller knew, or should have known in the exercise of reasonable care, that the furnishing of liquor to *this individual* posed a foreseeable threat of serious harm to another.

Id. (emphasis added).

In *Shelby*, the plaintiff failed to prove that the patron who shot her husband was served alcohol while “obviously intoxicated,” and thus the court was not called upon to determine the scope of liability in an over-service case. The court did note, however, that “the case law of this state has repeatedly recognized that a tavern owner is not the ‘insurer of his patrons’ safety,’ thus excluding any tendency to adopt a strict liability approach.” *Id.*

In a series of cases decided after *Shelby*, the Washington Supreme Court reiterated that the liability of a bar owner for injuries resulting from the service of alcohol to an “obviously intoxicated” patron was not “strict,” and in fact, its liability is limited. For example, in *Estate of Kelly*

v. *Falin*, 127 Wn.2d 31, 38, 896 P.2d 1245, 1248 (1995), the liability of a bar owner did not extend to “self-inflicted injuries”:

“[A] requirement that commercial establishments pay for the self-inflicted injuries of an intoxicated patron abrogates the Legislature’s repeal of the “Dramshop Act”, and therefore is insupportable. Under the “Dramshop Act”, an intoxicated adult could hold a commercial vendor accountable for self-inflicted injuries, but by repealing the “Dramshop Act”, the Legislature rejected imposing liability. We repeatedly have recognized that the “Legislature is the appropriate body to address any such changes in [this area of] the law”. *Christen*, 113 Wn.2d at 494 (citing *Burkhart v. Harrod*, 110 Wn.2d 381, 383, 755 P.2d 759 (1988)). We refuse to contravene the Legislature’s explicit rejection of the “Dramshop Act.” To do so would usurp the Legislature’s authority to weigh who should be held accountable for alcohol-related accidents.”

Id.

In *Christen v. Lee*, the court held that the bar was not subject to liability for a “criminal assault” absent notice that the patron might become violent based on his behavior on the night of the injury or on previous occasions at the bar. *Id.* 113 Wn.2d at 491. The *Christen* court held as a matter of law that criminal assault was not within “the general field of danger traditionally covered by the duty not to furnish intoxicating liquor to an obviously intoxicated person.” 113 Wn.2d at 496. The court

explained that the general type of danger “encompassed by this duty is that of alcohol-induced driver error” which is a “commonly understood and foreseeable consequence of serving intoxicants to an already obviously intoxicated person.” *Id.* at 495-496.

Properly understood, *Christen* limits the range of foreseeable harms in an over-service case to those resulting from “alcohol-induced driver error.” In cases involving “drastically different” types of harm such as criminal assault, *Christen* requires “specific notice,” *viz.*, that the defendant “had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions.” As the court stated:

A criminal assault may be a foreseeable result of furnishing intoxicating liquor to an obviously intoxicated person, but only if the drinking establishment which furnished the intoxicating liquor had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions. A drinking establishment's awareness that a person possesses a knife does not by itself provide such notice; there must be some action on the part of that person indicating that he or she may actually use such a weapon.

Christen, 113 Wn.2d at 491. *See also Cameron v. Murray*, 151 Wn. App. 646, 654, 214 P.3d 150 (2009) (adult hosts were not subject to liability for

assault by intoxicated minor at high school graduation party absent evidence that “furnisher had more specific notice that the intoxicated person has violent propensities. It is not enough to rely on the general notion that bad things happen when crowds of young people get very drunk together.”)

Here, Moravec intentionally pointed a gun at plaintiff for the express purpose of scaring him. CP 258, 260. He “slipped” the trigger; the gun went off, and he shot plaintiff. Moravec was convicted of assault in the third degree – a felony. RCW 9A.36.031. Although Moravec claims that he believed the gun was empty and did not intend to injure plaintiff, his conduct in pointing a gun at plaintiff was *intentional* and constituted a crime even if no harm ensued. RCW 9.41.230.

The shooting here amounts to “criminal assault” as a matter of law and clearly falls under the rule set forth in *Christen*. To avoid summary judgment, plaintiff was required to produce evidence from which a reasonable juror could conclude that Rancho Viejo “had some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions.” *Christen v. Lee*, 113 Wn.2d at 491. Plaintiff failed to produce that evidence, and the trial court correctly dismissed his claim.

1. **The “specific notice” rule in *Christen* applies to reckless or criminally negligent assaults.**

Plaintiff contends that felony assault in the third degree is not the type of “criminal assault” contemplated by the *Christen* court.⁶ Even if that were true, negligent or reckless assault nonetheless falls outside “the general field of danger traditionally covered by the duty not to furnish intoxicating liquor to an obviously intoxicated person,” *i.e.* drunk driving accidents, and implicate the same “specific notice” rule.⁷ *Christen*, 113 Wn.2d at 496. Contrary to plaintiff’s assertions, recklessly caused shootings are not a “commonly understood and foreseeable consequence of serving intoxicants to an already obviously intoxicated person” (*Id.* at 495-496) and are *not* generally foreseeable like drunk driving accidents.⁸

⁶ Note 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. *See State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987).

⁷ Plaintiff baldly asserts that “firearms accidents are within the field of danger of overserving bar patrons” (Appellant’s Brief at p. 20) and cites a FELA case (*Seeberger v. Burlington N.R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999)) and a sexual assault case (*McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)), neither of which supports the assertion.

⁸ The difference between cars and guns is obvious, and in particular, the difference between a car and Moravec’s .45 caliber semi-automatic handgun with a “tactical” flashlight. CP 328, 560. Indeed, plaintiff submitted an article from the on-line Washington Post “Wonkblog” entitled “Guns are now killing as many people as cars in the U.S.” CP 239-241. That “blog” post states in part:

Footnote continued on next page.

There is an obvious difference between driving a car and shooting someone with a .45 caliber semi-automatic handgun,⁹ and while shooting deaths may exceed the number of automobile related deaths in Washington (Appellant's Brief at 28), almost all of the shooting deaths in Washington were *intentional* – either *suicide* or *homicide*.¹⁰ There is no evidence in the record that alcohol-related gun accidents are epidemic or even frequent in Washington, and again, the accident here did not result from unintentional conduct like drifting over the center-line or falling asleep at the wheel of a mini-van. It resulted from the *intentional* act of pointing a .45 caliber semi-automatic handgun at a person, pulling the trigger and dropping the hammer.¹¹

“Gun deaths and vehicle deaths are in many ways two different problems. Gun deaths are typically intentional – people deliberately kill either themselves or someone else. Motor vehicle deaths, by contrast, are usually accidental. And cars are much more complicated machines than guns, with a lot more components and systems to iterate and improve upon.”

⁹ See https://en.wikipedia.org/wiki/M1911_pistol. The 1911 was developed as a military sidearm. It is a single-action semi-automatic handgun, meaning that Moravec had to cock the hammer before the gun would fire.

¹⁰ See note 1.

¹¹ Even if the ambit of foreseeable harms in an over-service claim extended beyond drunk driving, the supposed “accident” in this case was “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *McLeod v. Grant Cy. Sch. Dist.* 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953).

Stripped to its essentials, plaintiff's argument is simply that many people act recklessly when intoxicated; many people own guns, and therefore bar owners should foresee that intoxicated patrons will return home after drinking and intentionally or recklessly shoot their social guests. The logical conclusion of plaintiff's argument is that bar owners should be strictly liable for all gun-related injuries to third-parties caused by obviously intoxicated patrons, notwithstanding the repeal of the Dramshop Act 62 years ago and the admonition in *Shelby v. Keck* "that a tavern owner is not the 'insurer of his patrons' safety,' thus excluding any tendency to adopt a strict liability approach." *Id.* 85 Wn.2d. 916-17.

The common law rule was one of non-liability except when alcohol was sold to a person "in such a state of helplessness or debauchery as to be deprived of his willpower or responsibility for his behavior." *Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d at 762 (quoting with approval from 30 Am. Jur. Intoxicating Liquors § 521 (1958)); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 252, 78 A.2d 754, 755 (1951) (cited in *Halvorson*; defendant held liable where he rendered another "helplessly drunk" and then "plac[ed] him bodily, in a state of unconsciousness, in the sleigh and start[ed] the horses.") Although liability for negligent over-service has expanded over the last 60 years, it has done so incrementally and against a backdrop of non-liability. No Washington court has ever

found a bar owner liable for serving alcohol to an intoxicated patron who intentionally *or* recklessly shoots a third party in the absence of evidence of “specific notice;” that is, the bar owner had notice or knowledge that the intoxicated patron *had a gun, and based on his behavior, he was likely to use it. See e.g. Christen v. Lee*, 113 Wn.2d at 498 (noting that bar owner’s knowledge that intoxicated patron had a knife was insufficient to prove foreseeability of later, off-premises stabbing).

Indeed, apart from drunk-driving accidents, the Washington courts have never imposed liability on a bar owner for *any* harm to a third-party caused by an intoxicated patron in the absence of “specific notice” that the patron might cause the harm that actually occurred. This rule echoes the general common law rule that an actor has no duty to prevent another person from causing negligent or intentional injury to a third-party. *See generally Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) (stating rule).

There are, of course, recognized exceptions to the common law rule of non-liability including premises liability (*Shelby v. Keck, supra*), negligent entrustment (*House v. Estate of McCamey*, 162 Wn.App. 483, 264 P.3d 253 (2011)) and where “a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.” *Petersen v. State*, 100 Wn.2d 421, 426, 671

P.2d 230 (1983) (quoting Restatement (Second) of Torts § 315 and discussing psychiatrist duty to prevent patient from injuring third-parties); *Binschus v. Dep't of Corr.*, 186 Wn.2d 573, 380 P.3d 468 (2016) (duty of jailor to prevent injury by inmate).

In each of these common law claims, however, the plaintiff must prove that the actor had notice or knowledge of the other person's potential for causing injury to a third-party, either because the actor *supplied* a dangerous instrumentality to the other person knowing that he was "reckless, heedless, or incompetent" (*House*, 162 Wn.2d at 489)¹² or because the actor knew based on his experience with the other person that he presented a risk of harm to others. *Binschus*, 186 Wn.2d at 581; *Jones v. Leon*, 3 Wn.App 916, 925, 478 P.2d 778 (1970) (drinking establishment not liable where there was no evidence that it "had knowledge of any propensity of [the assailant] to use a gun.") In other words, "specific notice" is fundamental to every common law claim imposing liability on an actor for failing to control the actions of another person who negligently or intentionally causes harm to a third party.

¹² See also *Bernethy v. Walt Failor's Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982) (foreseeable to a gun shop owner that a customer might shoot his wife because the owner sold the customer a gun and ammunition while the customer was grossly intoxicated.)

For example, in *Schwartz v. Elerding*, 166 Wn.App. 608, 624, 270 P.3d 630, *review denied* 174 Wn.2d 1010 (2012), defendants' son was turning his truck around in an unfamiliar area when it became stuck in plaintiff's driveway. When plaintiff came out of his house to help, he determined that the son was intoxicated and took the keys to the truck. A scuffle ensued, and the son hit plaintiff with the butt of a shotgun he had been given to him by defendants. Plaintiff was seriously injured and sued defendants under a number of theories including negligent supervision, negligent entrustment and negligence based on defendants' violation of RCW 9.41.080 (prohibiting delivery of firearm to minor subject to certain exceptions). *Id.* 166 Wn. App. 615-616. The trial court dismissed all the claims because there was no evidence that defendants "foresaw any unreasonable risk of harm." *Id.* 166 Wn. App. 617.

On appeal from the dismissal of the negligence claim, plaintiff contended that the harm should have been foreseen because there is "widespread knowledge that any and all minors have a dangerous proclivity when it comes to guns" and that "a minor misusing a gun is foreseeable by almost everyone." *Id.* 166 Wn. App. at 620. The court disagreed and affirmed the dismissal because there was no evidence that the defendants "had any special knowledge about [their son] that would give them reasonable cause for concern." *Id.* Thus, even in an ordinary

negligence claim based on the violation of a statute prohibiting the delivery of a firearm to a minor, the court required evidence that defendants knew or should have known that the minor was likely to cause harm to a third-party. It was not enough to prove generally that “teenagers and guns don’t mix.”

The Oregon Supreme Court recently refused to find liability in an over-service case based on a similar argument that “accidental” assaults by intoxicated patrons are necessarily foreseeable because “intoxicated drinkers” frequently act violently or recklessly. *Chapman v. Mayfield*, 358 Or. 196, 361 P.3d 566, 577–578 (2015). In *Chapman*, a 67 year old man, Mayfield, drank to the point of intoxication at an Eagles Lodge (“Lodge”). While at the Lodge he “danced and had a good time” and was described by the Lodge employees as being a “very nice man” and “polite.” 358 Or. at 198. Unbeknownst to the Lodge, Mayfield was carrying a concealed handgun in his vest. *Id.* After leaving the Lodge, he went to a different bar where he was refused service. He then walked across the street to a third bar where he “pulled the concealed handgun from his vest and fired into the building, striking both of the plaintiffs and injuring them. No evidence in the record suggests any motive for Mayfield’s actions.” *Id.*

Plaintiffs brought suit against Mayfield alleging that he *recklessly or negligently* shot into the club. They also sued the Lodge, alleging that

it should have foreseen that Mayfield would act “violently” because “[i]ntoxicated drinkers frequently become violent.” *Id.*, 358 Or. at 200. Defendant moved for summary judgment on the ground that there was no evidence that Mayfield’s shooting of plaintiffs was reasonably foreseeable to the Lodge. In response, plaintiffs argued that they were not required to prove that the Lodge should have foreseen a particular type of criminal assault – an attack with a gun – or that Mayfield in particular would become violent. *Id.* All they needed to prove was that Mayfield was intoxicated *and* that it is commonly understood that intoxicated people “frequently become violent.” *Id.* The trial court disagreed and granted the motion, and the judgement was upheld by the Oregon court of Appeals. In affirming the Court of Appeals, the Oregon Supreme Court held:

Although it may be common knowledge that intoxicated people often have impaired judgment and may, therefore, act improperly, such general knowledge is not sufficient to permit a jury to decide, from the fact of overservice alone, that one who serves alcohol to a visibly intoxicated person should reasonably have expected that that person would commit an assault. [citation omitted] We decline plaintiffs' invitation to extend the limits of foreseeability that far.

* * * * *

As explained, evidence that it is common knowledge that intoxicated people have impaired judgment and may, therefore,

behave improperly is too general to establish that a person who serves a visibly intoxicated person reasonably should expect that that person will commit an assault. Evidence making the bare assertion that it is common knowledge that visibly intoxicated persons frequently become violent is no more sufficient. Such evidence does not create a permissible inference that a particular defendant should have been aware of an unreasonable risk of violent harm or that a particular plaintiff was within the class of persons at risk of such harm.

Id., 358 Or. at 221-222 (emphasis added).

Here, as in *Chapman*, plaintiff failed to offer any evidence that Rancho Viejo should have known based on its experience with Moravec that he owned a gun and was likely to shoot someone after he became intoxicated. The record consists of nothing more than *argument* that intoxicated people act recklessly and may shoot people. Under *Christen* and the common law in Washington, that is not enough to create a genuine issue of material fact on the issue of whether it was foreseeable to Rancho Viejo that *Moravec* would leave the bar, intentionally point a gun at a guest in his own home and shoot him.

There is no basis in Washington statutory law, common law or “public policy” for accepting plaintiff’s invitation to impose strict liability on bar owners for criminally negligent or reckless assaults perpetrated by intoxicated patrons simply because those assaults are foreseeable based on

common knowledge that “intoxicated people often have impaired judgment and may, therefore, act improperly.” *Id.* In over-service cases alleging a criminal assault by an intoxicated patron – whether that assault is characterized as intentional, reckless or negligent – the existing and correct rule in Washington is that plaintiff must prove that defendant had notice that the assault might occur based on the “prior actions of the person causing the injury, either on the occasion of the injury or on previous occasions.” *Christen v. Lee*, 113 Wn.2d at 491. Plaintiff failed to offer any evidence that Rancho Viejo had such notice in this case, and his claims were properly dismissed on summary judgment.

Plaintiff concludes with an argument that Washington public policy somehow establishes foreseeability in this case or at least creates a genuine issue of material fact as to the foreseeability of plaintiff’s injury. As evidence of that policy, he points to the statement of intent in 2016 Initiative 1491 (Laws of 2017, ch 3, §1, *codified as* RCW 7.94.010 *et seq.*), a statute which allows certain persons to obtain “extreme risk protection orders” prohibiting people with mental disorders from buying or keeping firearms.

Although Initiative 1491 certainly supports the proposition that Washington voters believe that lunatics should not be allowed to buy or keep guns, nothing in the initiative or its history indicates that Washington voters intended to expand the liability of bar owners for gun-related injuries to third-parties by establishing the foreseeability of those injuries presumptively or as a matter of law.

Indeed, the actions of the Washington legislature over the last 62 years express a public policy in favor of *drinker responsibility* rather than seller liability. Following the repeal of the Dramshop Act in 1955, the legislature has not passed any new laws expressly imposing civil liability on bars and taverns for gun-related injuries to third-parties caused by intoxicated patrons. Instead, the legislature has done away with the doctrine of negligence *per se* except in limited circumstances and has focused its attention on punishing individuals who choose to drive while intoxicated. *See e.g.* RCW 5.40.040 (driving while intoxicated amounts to negligence *per se*; over-service does not).

Finally, the public policy considerations bearing on the issues presented in this case are wide-ranging and complex – from considerations

of personal responsibility¹³ to the availability of liability insurance covering “assault and battery.” See e.g. *Robinson v. Hudson Speciality Ins. Grp.*, 984 F. Supp. 2d 1199 (S.D. Ala. 2013) (interpreting liquor liability policy excluding coverage for bodily injury “arising out of or resulting from the possession, ownership, maintenance, use of or threatened use of a lethal weapon, including but not limited to firearms by any person.”) Creating a new and broad exception to the common law rule of non-liability based on public policy considerations clearly should be left to the legislature. *Estate of Kelly*, 127 Wn.2d at 38 (recognizing court’s “repeated[] refus[al]’ to impose broader exceptions to the common-law rule” (quoting *Christen*, 113 Wn.2d at 494) which “would usurp the Legislature’s authority to weigh who should be held accountable for alcohol-related accidents.”)

V. CONCLUSION

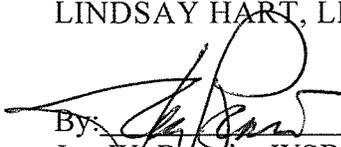
No Washington court has imposed liability on a bar owner for intentional or reckless gun-related injuries to a third-party caused by an intoxicated patron absent notice that the patron had a gun and was likely to use it. The trial court correctly granted defendants’ motions for summary

¹³ “Given a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism.” *Estate of Kelly v. Falin*, 127 Wn.2d 31, 42, 896 P.2d 1245 (1995).

judgment because plaintiff failed to offer any evidence that defendants had notice or knowledge that Moravec owned a gun and was likely to use it to shoot plaintiff after leaving the bar, miles away in a private home.

Dated this 31st day of March, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on March 31, 2017 I caused to be filed with Division Two of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing Brief of Respondent Guitron Estrada, II, Inc. dba Rancho Viejo Sports Bar, upon the following:

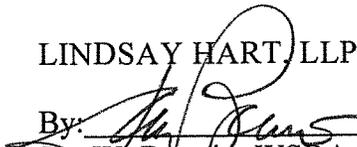
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