



Court of Appeals Confirms Stance on Complicity Doctrine in Case Involving a Passenger Injured by Intoxicated Driver

From the Desk of Jeff Eberhard: Recently, in *Mason v. BCK Corporation*, 292 Or App 580 (2018), the court held that an injured plaintiff could not recover against a bar because the plaintiff was unable to demonstrate that he did not “substantially contribute” to the driver’s intoxication. In this case, the court considers whether the personal representative of a deceased passenger can hold the bar liable for serving the intoxicated driver if the passenger and intoxicated driver spent several hours drinking and socializing together. Our firm represented the defendant bar in both the *Mason* case and the case that is the subject of this update, *Balzer v. The Roundup Pub*.

Claims Pointer: In this case, the passenger, driven by his intoxicated friend, was killed in a car accident. Prior to the accident, the two friends spent several hours socializing and drinking together. The Oregon Court of Appeals relied on *Mason*, which for the first time, defined conduct that “substantially contributed” to the driver’s intoxication (Oregon’s liquor liability statute requires the plaintiff to show that he or she did not “substantially contribute” to the driver’s intoxication in order to prevail on a claim against the bar). The court held that because the two friends spent several hours driving and socializing together and because Plaintiff could offer no evidence to show that the deceased passenger did not substantially contribute to the driver’s intoxication, the plaintiff could not prevail on a claim against the bar.

Balzer v. The Roundup Pub, 293 Or App 157 (2018).

Mitchell Johnson (“Johnson”) went to his long-time friend Byron Moore’s (“Moore”) house where they consumed one or two beers. Afterward, the two went to Washington Street Steakhouse & Pub (“Washington Street”) where the two of them consumed one or two beers. After Washington Street, Moore gave Johnson money to buy beer as Johnson did not have any money with him that night. Moore and Johnson next went to Bobby Sharon Carpenter, Dba The Roundup Pub (“The Roundup Pub”), where Moore bought Johnson drinks over a span of a couple hours.

They returned to Moore’s apartment, drank approximately two beers, and decided to return to The Roundup Pub. While at The Roundup Pub, the two friends consumed alcohol to the point where Moore was visibly intoxicated. After another patron bought Moore a shot, Moore “blacked out.” Despite being intoxicated, Moore drove from The Roundup Pub with Johnson as his passenger. While driving, shortly before 1:00 a.m., Moore crashed his vehicle, ultimately causing Johnson’s death. Plaintiff Barbara Balzer, in her capacity as a personal representative of Johnson’s estate, brought a wrongful death suit against The Roundup Pub. The Roundup Pub moved for summary judgment on the basis that Plaintiff could not prove that Johnson did not “substantially contribute” to Moore’s intoxication. The trial court granted the summary judgment motion. Plaintiff appealed.

The Oregon Court of Appeals relied extensively on its decision in *Mason*, citing directly to *Mason* for definitions on “substantial contributions,” and definitions of substantial contributions under subparagraphs (A), (B), and (C). Specifically, the court noted that it



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defined substantial contribution in *Mason* as conduct that:

is a significant and material factor in the patron or guest's intoxication, as opposed to a factor that a reasonable person would regard as insignificant.

Mason determined that "providing or furnishing" alcohol as set out in subparagraph (A) "includes directly or indirectly supplying a person with alcoholic beverages, including through purchasing and making available the alcohol." As for subparagraph (B), *Mason* held that "encouraging" by the plaintiff is "conduct that encouraged the patron or guest to purchase alcoholic beverages, drink alcoholic beverages, or otherwise engage in drinking activities, such as drinking with the person or 'bar hopping.'" (emphasis added). Lastly, for subparagraph (C), *Mason* determined that "facilitating" was "knowingly making it easier for the intoxicated person to consume alcoholic beverages."

After setting out the legal framework in *Mason*, the court turned to the case at hand. The court stated that there was no dispute that "Johnson and Moore spent several hours on the night in question drinking and socializing together." According to the court, even if Johnson did not purchase Moore's alcohol, socializing and drinking together could be considered "encouraging" Moore's purchase and consumption of alcohol as set out in subparagraph (B). The court noted that under such circumstances, Plaintiff was obligated to provide some evidence to allow the jury or judge to make a nonspeculative finding that Johnson's conduct was not a significant and material factor in Moore's intoxication. Because Plaintiff failed to come forward with such evidence, the jury or judge would be left to speculate about the role of Johnson's conduct.

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