ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERTO TORRES, et al., Plaintiffs/Appellees, v. JAI DINING SERVICES (PHOENIX) INC., Defendant/Appellant.	Court of Appeals Division One No. 1 CA-CV 19-0544 Maricopa County Superior Court No. CV2016-016688

AMICUS CURIAE BRIEF ON BEHALF OF ARIZONA ASSOCIATION OF DEFENSE COUNSEL

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I. The Arizona Association of Defense Counsel (AADC) is interested in the proper interpretation of the Arizona Constitution with respect to the development of the common law.

The AADC appreciates the Court's invitation to submit an *amicus curiae* brief. As a statewide organization of defense attorneys who practice mainly in the area of civil defense litigation, the AADC is interested in proper constitutional interpretation and the interplay of the Arizona Constitution and the development of the common law. Arizona Constitution Article 18, § 6—the anti-abrogation clause—is of particular importance to the civil defense bar, whose clients' interests are materially affected by its application to legislative policy decisions.

II. The Court should confirm the temporal limitations of Arizona Constitution Article 18, § 6.

The anti-abrogation clause must be viewed through the lens of its historical purpose and interpretation. Through its evolution from being used mostly to protect workplace lawsuits to its more contemporary application to tort lawsuits of all kinds, the founders' understanding of the common law has been at the heart of interpreting this provision. And historical understandings of art. 18,§ 6 are critical to evaluating the constitutionality of A.R.S. § 4–312.

A. Historically, the anti-abrogation clause was intended prevent legislative and executive destruction of causes of action against employers that existed at the time of statehood.

Article 18, § 6 of the Arizona Constitution provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation . . .." Article 18 is the "Labor" article of the Constitution. And it includes provisions expressly devoted to labor and employment matters, such as the eight-hour day, child labor, and black lists. Ariz. Const. art. 18, §§ 1, 2, 9. As Professor Bender has pointed out, based on the text and location of art. 18, § 6, courts could have "easily limited application of the anti-abrogation right to employment litigation." Paul Bender, "The Arizona Supreme Court and the Arizona Constitution: The First Hundred Years," 44 Ariz. St. L.J. 439, 447 (2012).

Indeed, the earliest cases citing art. 18, § 6 were employee suits. *See, e.g.*, *Consolidated Ariz. Smelting Co. v. Ujack*, 15 Ariz. 382 (1914) (involving right of employee to sue employer for negligence; citing art. 18, § 6 in dissent); *Morrell v. City of Phoenix*, 16 Ariz. 511 (1915) (involving claim of city employee against city; *Behringer v. Inspiration Consol. Copper Co.*, 17 Ariz. 232 (1915) (involving claim of employee widow for death of spouse killed while working in mine). Not long after statehood, however, the Arizona Supreme Court, suggested in dicta that this section could have broader application. *See Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 444

(1926) ("The common-law act of negligence, as modified by the Constitution, is now much 'provided' by that instrument for the benefit of all, be they employees or others . . ..").

Despite *Hunt*'s dicta, well into the 1960s, Arizona courts continued to emphasize that art 18, § 6 was created to preserve the right to sue for workplace injuries. *See, e.g.*, *Morgan v. Hays*, 102 Ariz. 150, 156 (1967) ("By Article 18, s 6 of the Constitution of Arizona, adopted at statehood in 1912, employees were guaranteed a right of action to recover damages for personal injuries suffered during the course of employment."). The first reported case of which AADC is aware involving an art. 18, § 6 challenge outside the employment context was *Harrington v. Flanders*, 2 Ariz. App. 265, 266–67 (1965), a consolidated case relating to automobile accidents. There, the Court of Appeals rejected an argument that a statutory provision extinguishing damages for pain and suffering upon the death of a person violated art. 18, § 6. The Court held that the statute was constitutional because "[o]nly such common law rights and remedies as existed at the time of the adoption of the Constitution are preserved." *Id*. In 1977, the Arizona Supreme Court—in analysis comprised of four sentences—rejected a claim that abolishing the collateral source rule in the Medical Malpractice Act violated art. 18, 6. *Eastin v. Broomfield*, 116 Ariz. 576, 584 (1977). The first reported Arizona opinion in which an Arizona court relied on art 18, § 6 to invalidate a statute in a non-

employment case occurred in 1979. In *McKinney v. Aldrich*, 123 Ariz. 488, 491 (App. 1979), a divided panel of the Court of Appeals concluded that a provision barring a claim against the insured of an insolvent insurer unless the injured person had first recovered all of an uninsured motorist policy violated art 18, § 6. As with *Harrington* and *Eastin*, the Court did not address the historical context of this provision in applying it to these lawsuits.

In the 1980s, through a string of opinions written by Justice Feldman, the Arizona Supreme Court began actively broadening the judicial construction of art. 18, § 6. *See Kenyon v. Hammer*, 142 Ariz. 69, 74 (1984) (concluding art. 18, § 6 is "more specific and stronger" than an open court provision, invalidating statute of repose in medical malpractice); *Barrio v. San Manuel Div. Hosp. for Magma Copper*, 143 Ariz. 101, 107 (1984) (finding statute of repose violated art. 18 § 6); *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 15 (1986) (expanding art. 18, 6 to "injury to real property, personal property, reputation, privacy, and other noncorporeal rights"). Despite this expanding view of art. 18, § 6, the founders' understanding of the law has remained a touchstone of jurisprudence interpreting it. *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 3, 5 ¶¶ 9, 18 (2003) (explaining that art. 18, 6 protects only negligence actions that "existed at common law or have found its basis in the common law at the time the constitution was adopted"); *Cronin v. Sheldon*, 195 Ariz. 531, 539 ¶ 39 (1999) ("the anti-abrogation

clause applies only to tort causes of action that either existed at common law or evolved form rights recognized at common law.")

B. Arizona courts have used imprecise and sometimes conflicting language to describe art. 18, § 6's purpose and scope.

Despite cases delving more deeply into art. 18, § 6 over the last 40 years, confusion remains about what, precisely, this provision means and what legislative enactments it precludes. In *Hazine v. Montgomery Elevator Co.*, 176 Ariz. 340, 344 (1993), a divided Supreme Court—over the strong dissent of Justice Martone—concluded that "[t]he evolution of common law causes of action—whether in duty, standard of care, or damages—falls within the broad coverage of art. 18, § 6." In other words, the Court determined that not only causes of action that existed at the time of statehood, but also its own later pronouncements about the common law, were protected from legislative abrogation.

The AADC is not aware of any case in which an Arizona court has relied on this "evolution" of common law concepts to invalidate a statute. And since *Hazine*, subsequent Supreme Court opinions have backed away from its expansive language. In *Cronin*, the Court clarified that *Hazine* provides that "the anti-abrogation clause applies only to tort causes of action that either existed at common law or evolved ***from rights recognized at common law***." 195 Ariz. at 539 ¶ 39 (emphasis added). And ten years after *Hazine*, in *Dickey*, the Court held (over the dissent of Justice Feldman) that "Arizona's anti-abrogation provision was designed to protect rights

of action in existence at the time it was adopted, but not necessarily those later created." 205 Ariz. at 5 ¶ 18.

In three opinions over the period of a decade, the Arizona Supreme Court announced varying standards under which to evaluate statutes under art. 18, § 6. Under *Hazine*, a court must invalidate any statute in conflict with an Arizona judicial determination about the common law, regardless of whether it reflects the common law rule at statehood. 176 Ariz. at 344. But under *Cronin*, a statute is unconstitutional only if it abrogates the common law or rights that evolved from it. 195 Ariz. at 539 ¶ 39. And, in contrast to *Hazine*, *Dickey* makes clear that art. 18, § 6 does not necessarily implicate all causes of action that arose after statehood. 205 Ariz. at 5 ¶ 18.

Considering art. 18, § 6 given *Cronin* and *Dickey*—as well as the decades of contrary case law that preceded it—*Hazine*'s language conferring automatic constitutional protection to post-statehood developments in the common law appears to be an overstatement. For decades before *Hazine,* Arizona courts reaffirmed that art. 18, § 6 applied only to the common law in existence at statehood. *See, e.g.*, *Indus. Comm'n v. Frohmiller*, 60 Ariz. 464, 468 (1943). And in the ten years immediately following *Hazine*, the Supreme Court walked back *Hazine*'s expansive language. The resulting current standard is less sweeping, but also less defined. Article 18, § 6 bars statutes that abrogate common law causes of action that existed at the time of

statehood, as well as some (but not all) aspects of the common law that have developed since statehood, as long as they evolved from "rights recognized at common law." *Cronin*, 195 Ariz. at 539 ¶ 39; *see also*, *Dickey*, 205 Ariz. at 5 ¶ 18.

C. At a minimum, art. 18, § 6 cannot provide constitutional protection to common law developments that contradict the common law in existence at statehood.

In light of *Cronin* and *Dickey*, *Hazine*'s bright line rule cannot carry the day. Not only has the Supreme Court retreated from its all-encompassing language, applying it creates constitutional and policy concerns. If, as *Hazine* suggests, all judicial development of common law torts have constitutional import, it has the effect of transforming the judiciary into an undemocratic super-legislature declaring the public policy of the state. And it essentially turns all judicial opinions on tort law into constitutional opinions. Though developing the common law and policy is within the purview of the courts, the court cannot concentrate power to make those common law developments beyond the reach of the other branches of government. *See Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶¶ 27–28 (2009). Under the Arizona Constitution, "judge-made substantive law is subordinated to contrary legislative acts validly adopted . . . [t]hus, when a substantive statute conflicts with the common law, the statute prevails under a separation of powers analysis." *Id*.

Besides creating separation of powers issues, accepting the broadest reading of *Hazine* risks seriously eroding public trust in the judiciary. With "no influence

over the sword or the purse," the judiciary's authority derives from the confidence of the public. Federalist No. 78, p. 412 (J. Pole ed. 2005) (A. Hamilton). Ordinary citizens may rightly be alarmed if an unelected judiciary grants itself the right to dictate nuances of public policy in a way that the democratically elected branches of government cannot reverse short of a constitutional amendment. Though judicial independence is one of the strengths of Arizona judiciary, all too often, its independence and the merit selection that secures it is under attack. Public perception that courts act as unelected legislatures only creates ammunition for those who bristle at and seek to undermine the independence of the judiciary.

This interpretation also creates policy trajectories that the framers likely did not intend. If the anti-abrogation clause enshrines post-statehood case law, then Arizona policy can move in only one direction: toward a system of greater and greater civil liability. There could be no mechanism for the Legislature to make policy decisions with respect to torts recognized at common law except to expand liability. Arguably, the same rationale could bind later courts. The framers intended to create a floor for tort liability in Arizona through art. 18, § 6, but it is less clear that it intended for that floor to be ever-evolving, always in the direction of greater liability.

That leaves this Court with the subsequent guidance offered by *Cronin* and *Dickey*. They require the Court to determine what later developments in the common

law evolved from "rights recognized at common law" at the time of statehood. *Cronin*, 195 Ariz. at 539 ¶ 39. This is not a simple standard to apply. Courts looking at historical records to determine what rights were "recognized" may draw conflicting conclusions. And it is hard to envision any cause of action or principle that a clever lawyer could not argue "evolved" from a right that existed at the time of statehood.

Notwithstanding *Dickey*'s and *Cronin*'s imprecise guidance, they affirm that the founders' understanding of the common law is essential to art. 18, § 6 jurisprudence. At a minimum, they show that the anti-abrogation clause cannot be used to protect judicial interpretations in direct opposition to the common law at the time of founding. Later changes to the common law that create causes of action or rights that statehood-era common law expressly disavowed should enjoy no protection under art. 18, § 6. Such causes of action did not "evolve" from rights that existed at statehood; they contradict them. By enacting constitutional provisions to safeguard the common law then in existence, the founders could not have intended to give constitutional protection to subsequent judicial pronouncements contradicting that same common law.

III. A.R.S. § 4-312 does not implicate the anti-abrogation clause.

As the Arizona Supreme Court explained in *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983), "[a]t common law . . . a tavern owner is not liable for injuries

sustained off-premises by third persons as the result of an intoxicated patron, even though the tavern owner's negligence in serving the patron was a contributing cause of the accident." This was the law from statehood until 1983. *Id*. In *Ontiveros*, the court rejected the traditional common law rule, finding that it was '"an anachronism, unsuitable to our present society.'" *Id*. at 507, *quoting Lewis v. Wolf*, 122 Ariz. 567, 570 (App. 1979).

The Supreme Court was within its right to shape the common law to account for current circumstances. But under *Cronin* and *Dickey*, that decision was not constitutionally immutable. The right of a third party to sue a tavern owner after being injured by an intoxicated patron was not among the "rights recognized at common law" at the time of statehood. *Cronin*, 195 Ariz. at 539 ¶ 39. Nor did it evolve from the common law because, as the *Ontiveros* court recognized, this outcome directly contradicted rather than evolved from the common law rule. 136 Ariz. at 507.

Because *Ontiveros* does not meet the standards announced in *Cronin* and *Dickey*, it does not implicate art. 18, § 6. The right to sue a tavern owner for injuries alleged to be caused by its patron did not exist at common law, and it did not evolve from a right that did exist. The common law was not silent on this topic: it affirmatively rejected such causes of action. The *Ontiveros* court could dispense with the common law rule. But the Legislature was also free to refine *Ontiveros*'s holding.

Division 2's contrary holding in *Young ex rel. Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995), must be rejected. *Young* was decided without the benefit of *Cronin* and *Dickey*'s clarification that art. 18, § 6 does not protect all post-statehood developments in the common law. Indeed, it did not address in any respect the temporal boundaries on applying the anti-abrogation clause. These are compelling reasons to reject a sister division's prior holding. *See Thielking v. Kirschner*, 176 Ariz. 154, 157 (App. 1993) (rejecting holding of other division when persuaded it was wrongly decided).

Likewise, to refuse to honor the stated policy choices of the Legislature under these circumstances illustrates the problems with an overly expansive view of art. 18, § 6. When the Supreme Court decided *Ontiveros*, it made an unabashed policy determination: that the common law rule did not suit modern society. 136 Ariz. at 507. At the same time, it acknowledged that there had been failed legislative efforts in this same arena, but declined to draw any conclusions about policy intent from the legislative inaction. *Id*. at 511–12. Three years after the Court chose the policy it believed most appropriate, the legislature enacted § 4-312, modifying its policy pronouncement in *Ontiveros*. Holding that art. 18, § 6 invalidates these statutes would allow the unelected judiciary to effect a policy change that the elected legislature itself had been unwilling to implement, and then insulate its decision from

the policymaking branch of government when it manifested its disagreement. This outcome diverges from separation of powers principles and the court's proper role.

Conclusion

The AADC respectfully submits that the anti-abrogation clause does not apply to § 4-312 because the judicially created cause of action it modifies directly contradicted the common law rule at the time of statehood. Case law mandating an outcome directly opposed to the common law rule is not a cause of action that existed at the time of statement, nor is it one that evolved from the common law. Thus, art. 18, § 6 does not limit the legislature's ability to modify it.

RESPECTFULLY SUBMITTED this 21st day of January, 2022

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