

ARIZONA COURT OF APPEALS

DIVISION ONE

ROBERTO TORRES, et al.

Plaintiffs/Appellees,

v.

JAI DINING SERVICES
(PHOENIX), INC.

Defendant/Appellant.

No. 1 CA-CV 19-0544

Maricopa County Superior Court
No. CV2016-016688

**AMICUS CURIAE BRIEF OF THE ARIZONA RESTAURANT AND
HOSPITALITY ASSOCIATION**

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INTEREST OF THE ARA

The Arizona Restaurant and Hospitality Association (“ARA”) represents the collective interest of the state’s restaurant and hospitality industry. The ARA is a voluntary trade association with a board of directors of 26 restaurant owners, operators, and suppliers. Central to the ARA’s purpose is to promote and preserve a healthy and stable business environment, educate industry participants on best practices and new regulations, and advocate for the industry on matters of importance to its members.

This case has potential ramifications for all liquor licensees with retail privileges, including restaurants, bars, hotels, convenience stores, grocery stores, breweries, wineries, distilleries, casinos, entertainment venues, and sporting venues. ARA members represent a significant portion of liquor licensed retail establishments and must comply with the vast statutory scheme regulating spirituous liquor, consisting of federal, state, and local laws. Additionally, these ARA members must purchase liquor liability insurance coverage. The availability of and cost of this coverage are directly related to the scope of potential tort claims brought against liquor licensed retail establishments.

At issue here is whether A.R.S. § 4-312 preempts the common law and makes the private right of action provided for under A.R.S. § 4-311 the injured person’s exclusive remedy, in cases where there are claims of personal injury, property

damage, or wrongful death. The ARA respectfully requests that this Court, in addressing this issue, hold that the statute preempts the common law. This would provide constructive guidance and clear limitations in an infinite universe of possible tort litigation. Such a ruling would also protect licensed establishments that comply with their statutory obligations.

ARGUMENT

I. The private right of action in the current statutory scheme is comprehensive and provides clear guidance.

The production, distribution, and sale of alcohol is highly regulated. *3613 Ltd. v. Dep't of Liquor Licenses & Control*, 194 Ariz. 178, 185 ¶ 32 (App. 1999) (noting that “engaging in the sale of liquor is . . . a highly regulated enterprise subject to the state’s police power”). Liquor licensees navigate a complex regulatory scheme, and compliance with federal, state, and local laws can often prove difficult. The industry develops best practices based on extensive consultation with various regulatory bodies that do not always provide consistent guidance. Adding yet another layer of amorphous standards existing only in the common law, with no relationship to the carefully crafted regulatory scheme already governing liquor licensees, creates unnecessary complexity at best—and at worst, leads to inconsistent results.

This case illustrates those inconsistent results and presents the “worst-case scenario” that is possible under the current regime. A jury concluded that JAI Dining Services (Phoenix), Inc. (“JAI”) complied with its statutory obligations, but

nonetheless found JAI liable under the common law. This case provides a unique opportunity for the Court to end this absurd inconsistency and provide clarity for *all* retail liquor licensees across the state.

The legislature addresses a liquor licensee’s liability in Title 4, Chapter 3, Article 2 of the Arizona Revised Statutes. A liquor licensee is liable to a third party for property damage, personal injury, or wrongful death only if the licensee sold spirituous liquor to (1) a person who is “obviously intoxicated” or (2) a person who is “under the legal drinking age without requesting identification containing proof of age or with knowledge that the person was under the legal drinking age.” A.R.S. § 4-311(A). The third party seeking damages from the licensee must also prove “[t]he purchaser consumed the spirituous liquor sold by the licensee” and “[t]he consumption of spirituous liquor was a proximate cause of the injury, death, or property damage.” *Id.* Failure to show *even one* of these elements is fatal to the third party’s claim and relieves the liquor licensee of any liability. *Id.*

Subsection (D) gives a standard for “obviously intoxicated” that is several steps up from mere cognitive impairment: “inebriated to such an extent that a person’s physical faculties are *substantially impaired* and the impairment is shown by *significantly uncoordinated physical action* or *significant physical dysfunction* that would have been obvious to a reasonable person.” *Id.* (Emphasis added). This definition mirrors that of A.R.S. § 4-244(14), which makes it unlawful for a licensee

or its employee to serve spirituous liquor to a disorderly or obviously intoxicated person, or to allow such a person to remain on the licensee's premises. The conspicuousness of a person's physical manifestations in determining obvious intoxication is important because this is not determined by, for instance, a blood alcohol test, but by observations made by a licensee or its employee. The legislature understands the environment in which this determination is made.

Finally, A.R.S. § 4-312(B) clearly sets forth the legislature's intent to limit a liquor licensee's liability to that in A.R.S. § 4-311: "[E]xcept as provided in section 4-311, a person, firm, corporation or licensee is not liable in damages to any person who is injured, or to the survivors of any person killed, or for damage to property which is alleged to have been caused in whole or in part by reason of the sale, furnishing or serving of spirituous liquor."

These statutes instruct liquor licensees on their obligations and allow licensees to train their employees (as provided by Title 4 and its rules) in such a manner as to protect the public. A predictable set of rules and standards also allows for the creation of an efficient market for liquor liability insurance coverage.

II. The common law creates confusion and absurd inconsistencies.

Allowing a third basis for liability to exist in the common law disrupts the statutory scheme and thwarts the legislature's intent. Even if the licensee fully complies with the statutory scheme, the licensee nonetheless can be liable if it does

not “exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party.” *Ontiveros v. Borak*, 136 Ariz. 500, 510–11 (1983). It is not at all obvious how licensees can conduct themselves and train employees to comply with both the definite statutory standard and this nebulous common law standard. The licensee can fully comply with its obligations under Title 4, yet still be held liable under the common law.

A few other examples illustrate. First, suppose a person over the legal drinking age consumes two drinks at a restaurant and does not show any obvious sign of intoxication before leaving the restaurant, but still causes an auto accident on the way home. Under the common law, the restaurant is potentially exposed to liability, even though it violated no law by serving a person over the legal drinking age who does not display significantly uncoordinated physical action or significant physical dysfunction.

Second, suppose a person who is not obviously intoxicated and is over the legal drinking age consumes one drink at a restaurant, leaves the restaurant, consumes several more drinks at another establishment, and is then involved in an auto accident. Again, under the common law, the first restaurant is potentially exposed to liability (or at the very least, must defend itself by, among other things, carefully scrutinizing the patron’s conduct for intervening or superseding causes), even though the restaurant violated no law.

Third, suppose a liquor licensee refuses service to an obviously intoxicated person and asks that person to leave the premises in compliance with A.R.S. § 4-244 (14) . The obviously intoxicated person secures a taxicab or rideshare. According to plaintiffs in this case, the licensee would remain liable for this person’s conduct, even though the licensee fully complied with its statutory duties and cannot legally control the individual’s conduct subsequent to riding the taxicab or rideshare. So is this person effectively a ward of the liquor licensee? If so, when does this “guardianship” end?

As these three examples show, the common law exposes liquor licensees to an untenable, and legislatively unintended, deluge of potential liability. This sort of expansive and ill-defined liability regime makes liquor liability coverage more expensive and more difficult to obtain—with several insurers even exiting the market in the past few years. See AmWINS Group, Inc., *Client Advisory: Four Factors that Determine Pricing for Liquor Liability Coverage*, available at <https://bit.ly/3kQo2hL>. This is the last thing restaurants and other liquor licensees, most of which are small businesses, need in the midst of the economic uncertainty during the COVID-19 pandemic with rising costs of goods and labor.

Eliminating a liquor licensee’s common law dram shop liability would not result in bars and restaurants running amok and endangering the public. Governments at all levels regulate liquor licensees and their establishments

extensively. Title 4 already prohibits liquor licensees from serving obviously intoxicated persons, and also require reasonable protection of customers. A.R.S. §§ 4-210(A)(10), 4-244 (14). A liquor licensee's violation of these laws, or the myriad of other statutes and rules regulating a licensee's conduct, exposes liquor licensees to not just a damages award, but also disciplinary action against its liquor license. These laws are enough.

CONCLUSION

The ARA respectfully requests this Court hold that A.R.S. § 4-312 preempts the common law of dram shop liability and limits a liquor licensee's liability to the parameters set forth in § 4-311.

RESPECTFULLY SUBMITTED this 21st day of January, 2022.

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