

SUPREME COURT OF ARIZONA

ROBERTO TORRES, et al.

Plaintiffs/Appellees,

v.

JAI DINING SERVICES
(PHOENIX), INC.

Defendant/Appellant.

Arizona Supreme Court No.
CV-22-0142-PR

Court of Appeals
Division One
No. 1 CA-CV 19-0544

Maricopa County Superior Court
No. CV2016-016688

**AMICUS CURIAE BRIEF OF THE ARIZONA RESTAURANT AND
HOSPITALITY ASSOCIATION¹**

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¹ In accordance with ARCAP 16(b)(1)(A), the Arizona Restaurant and Hospitality Association (“ARA”) affirmatively states that all parties to this appeal have consented in writing to the filing of this amicus brief.

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INTEREST OF THE ARA

The 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 across the business community, and certainly 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 article 18, § 6 of the Arizona Constitution abrogates the dram shop liability statutes, A.R.S. §§ 4-311 and 4-312, thereby protecting dram shop liability common law established over 70 years after statehood. The ARA respectfully requests that this Court, in addressing this issue, hold that A.R.S. §§ 4-

311 and 4-312 do not violate the anti-abrogation clause of the Arizona Constitution and do preempt the common law for dram shop liability. Such a ruling would provide constructive guidance and clear limitations in line with our legislature’s intent in what has been an infinite universe of possible tort litigation.

ARGUMENT

I. Article 18, § 6 of the Arizona Constitution does not abrogate the statutory scheme of dram shop liability.

The court of appeals’ opinion provides a comprehensive history and analysis of dram shop liability and the anti-abrogation clause. (Op. at ¶¶ 18-37.) The court of appeals correctly held that “§ 4-312(B) does not run afoul of the Arizona Constitution’s anti-abrogation clause ... because dram shop liability claims did not exist at common law in 1912.” (*Id.* at ¶ 2.) It further held that our “legislature expressly preempted the common law liability created by *Ontiveros* and *Brannigan* and replaced it with a more clearly defined statutory liability scheme.” (*Id.* at ¶ 38) (citing *Ontiveros v. v. Borak*, 136 Ariz. 500 (1983) and *Brannigan v. Raybuck*, 136 Ariz. 513 (1983)). The court of appeals’ analysis and holding provides the outcome with the clarity and guidance sought by the ARA in its previous amicus briefs.

II. The private right of action in the current dram shop liability 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 and ever-evolving 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 would be possible if this Court holds that article 18, § 6 protects post-statehood common law. A jury concluded that JAI Dining Services (Phoenix), Inc. (“JAI”) complied with its statutory obligations, but nonetheless found JAI liable under the common law. The court of appeals correctly overturned this result. (Op. at ¶ 39.) This Court should uphold the court of appeals’ decision and end the future potential for this type of 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 the following elements is fatal to the third party’s claim and relieves the liquor licensee of any liability: 1) a sale to a person who is obviously intoxicated *or* under the legal drinking age *and* 2) consumption of the alcohol sold *and* 3) proximate cause. *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 “obviously intoxicated” in 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.” (Emphasis added.) The statutory phrase “except as provided in” limits a dram shop liability claim to one based on the dram shop liability statutes, and its plain meaning unequivocally excludes any common law claim.

The legislature has instructed liquor licensees on their obligations in dram shop cases and has permitted the Arizona Department of Liquor Licenses and Control to require liquor law training on proper age identification and signs of obvious intoxication to assist in preventing such incidents. A.R.S. § 4-112(G)(2); A.A.C. R19-1-103. The legislature’s role in regulating alcohol far exceeds its role in determining dram shop liability: the entirety of Title 4 is devoted to alcohol regulation, and every year the legislature makes numerous changes to this title. Alcohol regulation is not a topic overlooked by the legislature.

III. The legislature purposefully drafted statutes to clarify the confusion and absurd inconsistencies.

If the plaintiffs in this case prevail, and this Court allows a basis for liability to exist in the common law pursuant to the anti-abrogation clause in article 18, § 6, such a ruling would disrupt the statutory scheme and thwart the legislature's intent. Even if the licensee fully complies with the statutory scheme, the licensee nonetheless can be liable under the post-statehood common law if it does not "exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party." *Ontiveros*, 136 Ariz. at 510–11. 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. As the history of this case has shown, a licensee can fully comply with its obligations under Title 4, yet still be held liable under the common law.

The common law exposes a liquor licensee 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 insurers 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

during an era of economic volatility and uncertainty 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. Government at the federal, state, and local levels regulate liquor licensees and their establishments extensively outside of dram shop liability. Title 4 already prohibits liquor licensees from serving obviously intoxicated persons, and requires the 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 a liquor licensee to not just a damages award, but also disciplinary action against its liquor license. For most businesses with a liquor license, the license is instrumental to the business's survival and any severe action against is potentially fatal. These laws are enough.

CONCLUSION

The ARA respectfully requests this Court hold that article 18, § 6 of the Arizona Constitution does not apply to post-statehood common law, and affirm the court of appeals' decision 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 15th day of May, 2023.

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