IN THE SUPREME COURT OF THE

STATE OF ARIZONA

Roberto Torres, et al.; Plaintiffs/Appellees, vs. JAI Dining Services (Phoenix) Inc.; Defendants/Appellants.	Arizona Supreme Court Case No. CV-22-0142-PR Court of Appeals - Division One No. 1 CA-CV 19-0544 Maricopa County Superior Court Case No. CV 2016-016688 **AMICUS CURIAE BRIEF OF HOMICIDE SURVIVORS, INC.**

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INTEREST OF THE AMICUS CURIAE

Homicide Survivors Incorporated ("HSI") is a nonprofit organization whose mission is to help meet the needs of homicide victims in the state of Arizona. HSI was incorporated in 1997 for the purpose of continuing and expanding the work of the charter chapter of Parents of Murdered Children which was previously founded in Tucson, Arizona in 1982. HSI provides emotional support to homicide survivors during the grieving process, provides a source of funds to assist victims with expenses resulting from homicides, provides criminal justice advocacy, and provides public education about the criminal justice system and the prevention of crime.

The homicide victims to whom HSI provides services are often family members of those killed by drunk drivers. Many of these drunk drivers were over-served at bars and restaurants before getting behind the wheel and leaving a trail of innocent victims in their wake. The outcome of the issues in this case directly impacts these victims' rights to recover damages for their injuries. HSI submits this brief to help preserve the rights of those victims to whom it provides services and the rights of those who are similarly victimized.

Alcohol-related collisions is an ongoing problem here in Arizona. **Figure 1**, below, is based on data compiled by the Arizona Department of Transportation ("ADOT") in its publication Arizona Crash Facts.

Year	Collisions	Alcohol-Related Collisions	% of Total Collisions that are Alcohol-Related	Alcohol-Related Collisions with Fatalities	Alcohol-Related Collision Fatalities	Alcohol-Related Collision Injuries	Population of Arizona (Source: Arizona Office of Economic Opportunity)
1980	79,870	12,570	15.7381%	300	327	11,123	2,731,960
1981	72,611	12,029	16.5664%	291	328	10,843	2,787,966
1982	68,306	9,839	14.4043%	208	246	9,020	2,888,807
1983	76,616	9,361	12.2181%	204	230	8,577	2,921,373
1984	88,037	10,802	12.2698%	249	285	9,752	3,049,227
1985	92,921	10,599	11.4065%	277	325	9,951	3,122,537
1986	99,809	10,972	10.9930%	335	387	10,180	3,317,016
1987	99,172	9,596	9.6761%	303	350	8,323	3,427,158
1988	96,225	9,013	9.3666%	296	334	8,426	3,499,723
1989	92,144	8,565	9.2952%	251	291	8,450	3,598,539
1990	91,121	8,821	9.6805%	255	284	8,756	3,682,913
2018	127,056	4,651	3.6606%	242	261	2,951	6,982,246
2019	129,750	4,907	3.7819%	234	256	2,969	7,082,093
2020	98,778	4,506	4.5617%	168	181	2,863	7,176,401
2021	121,345	5,620	4.6314%	215	243	3,609	7,285,370

Thus, as the table indicates, pre-*Ontiveros*, which was decided in 1983, drunk driving accounted for more than three times the percentage of all crashes since the *Ontiveros* decision. Total alcohol-related crashes have decreased by more than half in the years since *Onitveros* was despite – despite Arizona's fast-growing population.

While tougher DUI laws may account for some of these decreases over the years, the effect of the *Ontiveros* decision – that alcohol beverage vendors may be held responsible for drunk drivers who cause collisions – cannot be eliminated. The problem of deaths and injuries as a result of alcohol-related collisions, however, has not been entirely eliminated. HSI supports any activity that may reasonably reduce the number of homicide victims to zero.

INTRODUCTION

Negligence and negligence *per se* have been "right[s] of action to recover damages for injuries" since before Arizona's statehood. "Dramshop claims" – or an action against a vendor of alcoholic beverages for the injuries caused by an intoxicated patron – are nothing more than a specific type of negligence claim, just like that of an automobile collision claim, a premises liability claim, or a professional malpractice claim.

Dramshop claims were not unrecognized at statehood, but rather, after statehood, a common-law rule of "non-liability" evolved. This judge-made rule was based upon a perceived lack of duty running from the seller of alcohol to the person injured or a breach of the causal chain connecting the sale of alcohol to the injury caused as a result of a patron's intoxication. In *Ontiveros*, this Court analyzed the common law non-liability rule and found both bases lacking. The Arizona Supreme Court's reversal of the common-law rule of non-liability did not create a new "right of action to recover damages for injuries" that was not recognized at statehood, but rather, it reassessed how legal duty and causation affected what the *Ontiveros* court noted was nothing more than a common law negligence and/or negligence *per se* claim. In other words, the *Ontiveros* court recognized that a legal duty existed and the jury, rather than a judge, should decide the issue of proximate cause.

The Court of Appeals erred when it determined the prohibition against the abrogation of a "right of action to recover damages for injuries" in Article 18, section 6 of the Arizona State Constitution did not apply to negligence claims against a seller of alcohol. While the Legislature was free to supplement the common law right of such actions, the Arizona Constitution does not permit the Legislature to abrogate what is and, since statehood, always has been a protected negligence claim.

A. A "dramshop claim" is a "right of action to recover damages for injuries" protected by Article 18, Section 6 of the Arizona State Constitution

"To establish a claim for negligence, a plaintiff must prove four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, ¶ 9 (2007) (citing *Ontiveros v. Borak*, 136 Ariz. 500, 504 (1983)). "The cause of action for negligence was established in pre-statehood law." *Dickey v. City of Flagstaff*, 197 Ariz. 422, ¶ 32 (App. 1999). Negligence *per se*, or negligence derived by violation of statute, was also available before Arizona became a state. *See, e.g., Maricopa and Phoenix Salt River Valley R.R. Co. v. Dean*, 7 Ariz. 104 (1900) ("… the case turned upon the fact whether or not the statutory requirement… was complied with in this instance.").

One of the first Arizona cases to address an action against a seller of alcohol was *Pratt v. Daly*, 55 Ariz. 535 (1940). In that case, Anna Daly sought to recover damages from George Pratt and B. J. Moore, saloon keepers, who sold intoxicating liquors to Anna Daly's husband, someone they knew to be "… an habitual drunkard…". *Id.* at 535-47. The Arizona Supreme Court considered whether "the law recognizes an action of this nature." *Id.* at 535. The Court noted, "… it is plain from the facts pleaded that the tort, if one existed, sounds in negligence. Actionable negligence is of two kinds, statutory and common law." *Id.*

The Arizona Supreme Court went on to say that typically "(1) the consumption and not the sale is the proximate cause of any injury, and (2) …the consumer is guilty of contributory negligence which is imputed to plaintiff, and no recovery can be had." *Id.* at 539. Nonetheless, on the facts presented, the Court upheld a verdict against the sellers of alcohol since the sellers had reason to know that Anna Daly's husband was "… an habitual drunkard…" and determined that his consumption of alcohol was not voluntary. *Id. at* 546-7.

The Court in *Pratt* specifically addressed whether this was a new cause of action, stating:

> Every requested application of the principles of the common law to a new set of circumstances is originally without precedent… [W]e are not asked to make a law. We are asked to declare what the common law is and always has been, and a declaration by us that it has always permitted such an action, even though none has ever actually been brought, is no more legislation than would be a declaration that it does not.

Id. at 546. A few years later, the Arizona Supreme Court considered the case of *Collier v. Stamatis*, 63 Ariz. 285 (1945). There, the plaintiff was mother to a 15-year-old who was sold alcohol by a licensed tavern keeper. *Id.* at 287. Once again, the Court noted that "[t]he action [was] founded upon tort…". *Id.* Once again, the Court noted that "[a]ctionable negligence may be of two kinds, either statutory or common law… ." *Id.* at 288. In *Collier*, the Court upheld the dismissal of the plaintiff's complaint, not because such an action did not exist, but rather, because it was felt that "…when damage arises from voluntary intoxication[,] the seller of the intoxicant is, at common law, not liable in tort for the reason that his act is not the efficient cause of the damage." *Id.*

Collier's rule of non-liability for claims against the sellers of alcohol due to a lack of proximate cause continued in Arizona for a number of years. *See, e.g., Vallentine v. Azar*, 8 Ariz. App. 247, 249-8 (1968) (finding no proximate cause between the defendant bar serving the underage plaintiff alcohol and the plaintiff's subsequent injuries); *Thompson v. Bryson*, 19 Ariz. App. 134, 138 (1973) ("[W]e hold as a matter of law that… even had the jury found negligence on the part of the appellees in selling intoxicating beverage to Whitmore for his own ingestion, the element of proximate cause could not have been established"); *Lewis v. Wolf*, 122 Ariz. 567, 573 (App. 1979) (following *Collier*, but criticizing its reasoning as "anachronistic and illogical"). *But cf. Pierce v. Lopez*, 16 Ariz. App. 54, 58 (1971)

(holding that a tavern has a duty to protect their invitees); *McFarlin v. Hall*, 127 Ariz. 220, 224-5 (1980) (holding that injury caused by the violence of other patrons was foreseeable and, thus, proximate cause could be found).

Ontiveros v. Borak, 136 Ariz. 500 (1983) reanalyzed the issue of proximate cause arising in negligence cases against sellers of alcohol. The Arizona Supreme Court rightfully applied a negligence analysis to such actions which require a duty, breach of that duty, causation, and damages. *Id.* at 504. While the *Ontiveros* Court recognized that the common law rule had been one of non-liability for tavern owners, the Court also found that, in light of changing societal standards, the former common law rule of non-liability no longer applied:

> All counsel agreed at oral argument that the common law rule was not a rule of immunity. Indeed, it is impossible to imagine why, of all occupations, those who furnish liquor should be singled out for a judicially conferred blessing of immunity to respond in damages for their wrongful acts. The common law rule was one of nonliability, founded, as indicated in both *Pratt* and *Collier*, upon concepts of causation.

Id. at 505. Utilizing Arizona common law concepts that arose from negligence actions since statehood, the Arizona Supreme Court looked to whether there was "cause-in-fact" from the service of alcohol to the injury that was sustained. *Id.* The Court found, "Arizona law holds that cause-in-fact exists if the defendant's act helped cause the final result and if that result would not have happened without the defendant's act." *Id.* (citing *McDowell v. Davis*, 104 Ariz. 69,

72 (1968)). Proximate cause, according to the *Ontiveros* court, could also not be said to be a complete bar to recovery:

> The common law rule of tavern owner nonliability was mainly based upon the concept that the chain of legal causation between the selling of the alcohol and the injury was broken or "superseded by the voluntary act of the purchaser in imbibing the drink"… [but]… the original actor is relieved from liability for the final result when, and only when, an intervening act of another was unforeseeable by a reasonable person in the position of the original actor and when, looking backward, after the event, the intervening act appears extraordinary…
>
> The test, then, for whether the actions of a patron [] constitute a superseding cause which relieves the tavern owner from liability is whether [the patron's] conduct was unforeseeable to one in [the tavern owner's] position and whether the court can say with the benefit of hindsight that the occurrence of the harm through the conduct of the intervening actor was both unforeseeable and extraordinary.

Id. at 506 (internal citations omitted). Again, this was not the Arizona Supreme Court creating a new cause of action, but rather, the Arizona Supreme Court analyzed "dramshop claims" through the lens of a common law negligence or negligence *per se* action:

> We conclude, therefore, that those who furnish liquor have an obligation or 'duty' to exercise care for the protection of others. This is an obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons, whether such injury occurs on or off the premises. We find that duty both as a matter of common law and of statute. The duty is not limited to preventing violent or unruly conduct that threatens other patrons [citation omitted]; it includes the duty to exercise due care in ceasing to furnish intoxicants to customers in order to protect members of the public who might be injured as a result of the customer's increased intoxication.

Id. at 511. Since *Ontiveros*, this Court has repeatedly analyzed "dramshop claims" through the lens of common law negligence principles. *See, e.g. Gipson*, 214 Ariz. at ¶ 11 (citing to *Ontiveros* for the elements of actionable negligence); *Guerra v. State*, 237 Ariz. 183, ¶ 7 (2015); *Quiroz*, 243 Ariz. at ¶ 64-5 (2018). In *Quiroz*, the Arizona Supreme Court noted:

> A vendor is under a duty not to sell liquor where the sale creates a risk of harm to the customer or to others. This conclusion flows from general principles of negligence law… (citations and quotation marks omitted)
>
> … *Ontiveros* addressed the issue of duty by using Arizona's well-established duty framework: special relationships and public policy.

Quiroz, 243 Ariz. at ¶65. The point is this: An action against the seller of alcohol or a "dramshop claim" is and always has been nothing more than a negligence action. Common law and negligence *per se* claims have been around since before Arizona became a state. While a common law rule of "non-liability" arose, finding that, as a matter of law, some actions against sellers of alcohol were barred based upon a lack of causation, *Ontiveros* changed that perspective and allowed the issue of causation to go to a jury – but it did not create a new right of action were none had previously existed. The nature of the claim did not change; only the causation analysis was altered.

B. The Legislature cannot abolish common law "dramshop claims"

Article 18, section 6 of the Arizona Constitution states: "The right of action to recover damages for injuries shall never be abrogated…". Ariz. Const. art, 18, § 6. Yet, Arizona Revised Statutes, Title 4, section 312 seeks to do exactly that. A.R.S. § 4-312.

A.R.S. § 4-311 provides a statutory cause of action against a liquor licensee for a person who is injured – or their survivors if the person is killed – if the liquor licensee sold alcohol to a patron who was who was under the legal drinking age or to a patron who was obviously intoxicated – as defined by statute. A.R.S. § 4-311. A.R.S. § 4-312(a) immunizes the liquor licensee from claims under A.R.S. § 4-311 if the claimant is the intoxicated patron or was with the intoxicated patron while the intoxicated patron consumed the alcohol – or the survivor of either. A.R.S. § 4-312. A.R.S. § 4-312(b) goes even further:

> Subject to the provisions of subsection A of this section and except 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 spiritous liquor.

A.R.S. § 4-312(b). The effect of A.R.S. § 4-312 is to abrogate the common law negligence right of action to recover damages for injuries. As indicated by the Court of Appeals in their conclusion in *Young*, 184 Ariz. at 190:

> [S]ection 4-312(B) fails to afford plaintiffs such as Young a reasonable alternative to the general negligence action recognized in *Ontiveros* when they are injured by a driver that the licensee knows or should know is intoxicated, but the driver is not 'obviously intoxicated' as defined by section 4-311(C). By limiting licensee liability to section 4-311, section 4-312(B) does not merely 'regulat[e] the mode, method, and procedure to be followed in pursuing the cause of action ... [but] completely deprive[s] many who have sustained real injury of judicial remedy,' [citation omitted] and imposes the type of 'insurmountable defense' constructed by legislative act that our supreme court condemned….
>
> We therefore hold that section 4-312(B) unconstitutionally abrogates the general negligence cause of action recognized in *Ontiveros*, contrary to article 18, section 6 of the Arizona Constitution.

The foundation of the Court of Appeals' opinion in this matter is: "A.R.S. § 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." *Jai Dining Servs. (Phx.), Inc.*, 508 P.3d at 1159. However, this is an incorrect analysis of the legal underpinnings of a "dramshop claim". As this Court and the Courts of Appeals have repeatedly recognized, actions against the sellers of alcoholic beverages for the injuries caused as a result of that sale are common law negligence and/or negligence *per se* actions. As previously established, such claims existed at common law – it was simply felt that the element of causation was lacking. *Ontiveros* and its progeny changed that perception and now give the question of causation to the fact finder to determine. Negligence is not a new cause

of action – *Ontiveros* simply changed the causation analysis in negligence actions against the sellers of alcoholic beverages.

CONCLUSION

HIS joins with Torres and other Amici, the Arizona Association of Justice and Mothers Against Drunk Driving in urging this Court to determine that the Court of Appeals' decision was wrongly decided. "Dramshop claims" are not new actions; they are and always have been analyzed by the Courts as nothing more and nothing less than negligence actions. A.R.S. § 4-311 abrogates a right of action to recover damages for injuries that was recognized upon Arizona's statehood – even if that right of action was at one time felt, in some circumstances, to be legally deficient for want of causation. As such, the Arizona Supreme Court should reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 16th day of May, 2023.

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