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

DEFENDANT/APPELLANT JAI DINING SERVICES (PHOENIX) INC.'S COMBINED RESPONSE TO SUPPLEMENTAL AMICUS BRIEFS

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INTRODUCTION

JAI Dining Services (Phoenix) Inc. submits this combined response to the amicus briefs filed by (1) the Arizona Association for Justice/Arizona Trial Lawyers Association (AzAJ), (2) Mothers Against Drunk Driving—MADD Arizona Chapter (MADD), and (3) Homicide Survivors, Inc.

All three of these amici previously filed amicus briefs in this case in 2022 in support of the petition for review. JAI responded to those briefs on August 15, 2022. The new briefs filed in 2023 repeat many of the same arguments these amici made in their prior briefs. Accordingly, JAI refers the Court to its August 2022 response.

As for the new arguments, JAI responds to a handful of points below.

ARGUMENT

1. Contrary to the amici's suggestion, alcohol remains heavily regulated.

Both MADD and Homicide Survivors suggest that a common law private cause of action is necessary to prevent abuse of alcohol. Not so. Even with A.R.S. § 4-312(B) restored to its proper status as a valid and constitutional statute, nearly every aspect of the sale and consumption of alcohol will remain heavily regulated.

For starters, the criminal justice system will imprison people who drink and drive, especially if they injure others. Here, for example, Cesar Villanueva (the driver) was convicted of two counts of manslaughter and is serving a 14-year sentence. [IR-84.] Even if the driver does not harm anyone, it will still be illegal to

drive with "an alcohol concentration of 0.08 or more," or if the driver is "impaired to the slightest degree." A.R.S. § 28-1381(A)(1)-(2).

Drinkers will also be liable to victims for money damages. Here, the plaintiffs obtained a $1.2 million judgment against Villanueva. [IR-177.]

Bars will not be off the hook, either. Far from it. Bars will be liable for money damages to victims if the bar serves someone underage or obviously intoxicated. A.R.S. § 4-311(A). Here, the jury found for the bar on the plaintiffs' statutory claim (negligence per se), meaning the jury found that Villanueva was not obviously intoxicated. [IR-149.]

In addition, as JAI previously explained (8/15/2022 Response to Amicus Briefs at 18-21), nearly every aspect of the sale of alcohol is heavily regulated by statute and regulation. Bars that violate these rules face the full panoply of civil penalties, criminal penalties, and regulatory penalties. A bar could lose its liquor license, its bartenders could go to jail, its licensee can be debarred from obtaining a future license, and the bar could have to pay civil penalties and restitution to a victim. (*Id.* at 19-20 (collecting statutes).

Contrary to the amici's suggestions, therefore, *Torres III* did not undermine the regulation of alcohol. The only thing at stake in this case is whether a bar is liable for damages in a civil case for serving alcohol to a patron when it would not

"have been obvious to a reasonable person" that the patron was visibly impaired. A.R.S. § 4-311(D).

2. AzAJ misconstrues *Cronin* and *Dickey*.

AzAJ's brief (at 6-7) addresses *Cronin v. Sheldon*, 195 Ariz. 531 (1999), and *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1 (2003). It claims that "*Cronin* determined that claims created by statute do not carry constitutional protection." But that is not all *Cronin* held. *Cronin* also focused on the particular type of harm suffered by the plaintiff. In particular, the Court considered whether article 18, § 6 protected claims for wrongful discharge. It held that the provision does not "extend constitutional protection to all tort causes of action, whenever or however they may have arisen." 195 Ariz. at 538-39, ¶¶ 35-36. Instead, it "applies only to tort causes of action that either existed at common law or evolved from" a recognized common law right to recover for the injury. *Id.* at 539, ¶ 39.

Applying this framework, *Cronin* held that the legislature could abrogate a claim for employment discrimination because it "neither existed in 1912 when statehood was achieved, nor did it evolve from common law antecedents." *Id.* at 539, ¶ 37. *Cronin* distinguished *Hazine*'s broad "evolution" approach by explaining that "because a right of action for injuries caused by defective products *was* recognized at common law," the legislature could not abrogate right to recover for defective products. *Id.* at ¶ 36. In other words, *Cronin* focused on whether a

claimant could recover for the same type of injury in 1912. Contrary to AzAJ's suggestion, the fact that the claim in *Hazine* was created by statute is not the only reason that the Court concluded the anti-abrogation clause did not apply. *Id.*, ¶ 39.

As for *Dickey*, AzAJ argues (at 6-7) that the Court merely "determined that under sovereign immunity principles, the Anti-Abrogation Clause does not protect tort claims against municipalities," and that "*Dickey*'s analysis was limited to the issue before it: sovereign immunity." *Dickey* is not so limited, and AzAJ does not discuss the reasons *why* the anti-abrogation clause does not reach tort claims against municipalities.

Dickey extended *Cronin*'s reasoning to a common law negligence action similar to the one at issue here. This time, the Court's analysis focused on the particular type of defendant. In *Dickey*, the plaintiff challenged A.R.S. § 33-1551, which immunized municipalities from certain negligence claims. 205 Ariz. at 1-2, ¶ 1. Like with dramshop liability, American courts had considered and *rejected* negligence liability for municipalities at the time of statehood, but Arizona courts later abandoned the common law rule of municipal immunity. *Id.* at 3, ¶ 10 (citing 1913 treatise for nonliability); *id.* at 4, ¶ 14 ("this court abolished the common-law rule of sovereign immunity"). When it abolished common law municipal nonliability, the Supreme Court invited the legislature to delineate the scope of liability, much like it did in *Ontiveros*. *See id.* The legislature accepted the Court's

invitation and established the contours of liability for certain negligence actions against municipalities—again, much like dramshop liability. *See id.*

Dickey applied *Cronin*'s clarified standard: "to fall within the protection of the anti-abrogation provision of the Arizona Constitution, [the] right of action . . . must have existed at common law or have found its basis in the common law at the time the constitution was adopted." *Id.* at 3, ¶ 9. Under that standard, a general negligence claim against a municipality—which was not recognized at common law, then judicially recognized, and then legislatively restricted—is not protected "because a suit against a city for simple negligence *could not have been maintained* at the time the anti-abrogation provision was instituted." *Id.* at 3-5, ¶¶ 9-18 (emphasis added).

Contrary to AzAJ's argument (at 11), therefore, the court of appeals' holding in this case—that "if a plaintiff could not have asserted a claim for a particular type of harm against a particular defendant in 1912, then the anti-abrogation clause provides that claim no protection"—flows directly from *Cronin* (type of harm) and *Dickey* (type of defendant). (Op. ¶ 31.) The Court should, however, disavow the dictum in *Cronin* and *Dickey* that the anti-abrogation clause applies to "tort actions that '. . . evolved from rights recognized at common law,'" *Dickey*, 205 Ariz. at 3, ¶ 9 (quoting *Cronin*, 195 Ariz. at 539, ¶ 39), because the evolving-constitution concept contravenes the original public meaning of that clause.

3. Contrary to AzAJ's claim, article 18, § 6 does not protect claims "unavailable to a plaintiff until after 1912."

Citing a series of pre-*Cronin* and -*Dickey* cases, AzAJ also contends (at 8) that "Arizona courts have understood that the Anti-Abrogation Clause protects rights of action that this Court recognized to recover damages, including those unavailable to a plaintiff until after 1912." The "clear rule [that] emerges from these cases," AzAJ says (at 9), is that "if this Court conducts a common-law analysis and recognizes a right of action, the Anti-Abrogation Clause protects that right of action." JAI has analyzed those cases at length elsewhere, including in its August 15, 2022 response to the petition-stage amicus briefs (at 12-14). Fundamentally, however, to the extent those cases reflect the rule AzAJ articulates, they were wrongly decided from the beginning, and conflict with *Cronin*, *Dickey*, and the original public meaning of article 18, § 6.

4. Cases interpreting the U.S. Constitution confirm JAI's construction of article 18, § 6.

AzAJ critiques (at 10) JAI's analysis of the definite article ("The") that begins the anti-abrogation clause and thus limits its scope. AzAJ notes that the U.S. Supreme Court has applied the First and Fourth Amendments to new technology that did not exist at the Founding, even though those constitutional guarantees likewise begin with "[t]he." In this argument, AzAJ discusses *Kyllo v. United States*, 533 U.S. 27 (2001), and *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011). In both

cases, however, the U.S. Supreme Court endeavored to apply the original meaning of the constitutional guarantees to new technologies.

In *Kyllo*, the Supreme Court addressed whether using a thermal-imaging device aimed at a home constitutes a search under the Fourth Amendment. The Court expressly reaffirmed the principle that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure *when it was adopted*, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." 533 U.S. at 40 (emphasis added) (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). In holding that the thermal imaging device led to a search, the Court relied on the historic "firm line at the entrance to the house." 533 U.S. at 40 (citation omitted).

In *Brown*, the Court addressed whether restrictions on violent video games violates the First Amendment. The Court correctly held that "video games qualify for First Amendment protection," because First Amendment protections turn on *message*, not *medium*. 564 U.S. at 790. The central question was whether violent video games qualify for a *limitation* on free-speech rights. The Court said no, based on "traditional limitations," and emphasized that "that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." 564 U.S. at 791 (citation omitted).

In sum, yes, "Constitutional rights apply to changing circumstances," as AzAJ contends (at 10). No one disputes that principle. But that does not mean that the substantive *content* of those rights changes with the times.

Here, article 18, § 6 can be applied to reach technologies never imagined in 1912. For example, the clause would protect from abrogation a claim based on an on-the-job injury suffered midair by a flight attendant, even though commercial passenger aviation did not yet exist in 1912. The Constitution would protect the claim because the right of action that existed in 1912 included a claim brought against a person's employer (the particular type of defendant) for workplace injuries (the particular type of harm). In other words, the claim fell within article 18, § 6's protection because the action could have been maintained in 1912, not because the clause's meaning evolved to reach commercial aviation.

Moreover, neither *Brown* nor *Kyllo* suggested that the First or Fourth Amendment protects a right that courts had *rejected* at the time of their adoption, as AzAJ contends the anti-abrogation clause should do here. A patron causing injuries after drinking alcohol at a tavern is a tale as old as time; it was well known in 1912. But in 1912, the injured person lacked a "right of action to recover damages for injuries" from the tavern. Article 18, § 6. *See, e.g.*, *Collier v. Stamatis*, 63 Ariz. 285, 290 (1945) ("[I]t has been held by *all the courts* and by *every commentator*"

that dramshops are not liable) (emphases added). The clause therefore does not protect *Ontiveros*'s radical departure from the common law rule of nonliability.

5. The judiciary remains free to develop the common law.

AzAJ suggests that affirming the court of appeals would frustrate or even reverse the development of the common law. For instance, AzAJ says (at 10) that "Once circumstances change, it is the prerogative of a common-law court to recognize a change in the common law." True. But those post-statehood changes do not carry *constitutional* weight.

As an example, AzAJ invokes the loss-of-consortium claim. It asserts (at 12) that at common law, "only a husband could recover for the loss of his family," whereas courts recognized such claims for a wife, parent, or child only after 1912. AzAJ explains that under the court of appeals' analysis, those subsequent expansions would not enjoy constitutional protection. That's correct. The founders presumably would have known that a child could not recover damages for loss of consortium after losing a parent and would not have viewed themselves as protecting from abrogation a claim that would have failed when they drafted our Constitution. Nothing in article 18, § 6 indicates that the founders viewed themselves as protecting nonexistent rights.

Importantly, however, restoring the proper meaning of article 18, § 6 would not roll back the common law expansion of the loss-of-consortium claim. In other

words, it would not undo *Villareal v. State*, 160 Ariz. 474 (1989), which expanded the claim to cover children. It would simply mean that *Villareal* is not super-precedent, immune from later reconsideration or legislation.

Of course, that is ordinarily how the law works, both common law and statutory. Courts and the legislature alike ordinarily can expand and contract rights, yet in doing so neither branch of government wields a constitutional pen. Allowing this sort of flexibility, as JAI explained in its supplemental brief (at 22), advances rather than impedes the law's development. Imagine that a court extended a loss-of-consortium claim to a distant friend or even a cherished pet. If the protections of article 18, § 6 immediately attached, another court or the legislature would be powerless to tinker with that change. Nothing in the text of the anti-abrogation clause sanctions that avoidable result.

6. JAI's position respects the two-step abrogation analysis.

AzAJ claims (at 15) that JAI's position "conflates the two separate steps of the [anti-abrogation clause] analysis," because A.R.S. "§ 4-312 could eliminate dramshop liability *even if* § 4-311 did not create 'obviously intoxicated' liability." AzAJ is right that the legislature could eliminate dramshop liability if the decision below is affirmed, but wrong that JAI's argument conflates the two-step analysis. As AzAJ notes (at 14), the first step asks "whether the claim at issue falls under the Anti-Abrogation Clause's protection at all"; if it does, then the second step asks

whether the statute "is a permissible regulation of the claim rather than an abrogation."

Here, the claim falls outside of article 18, § 6's scope, so the analysis may end. At that point, the legislature and the courts can play their ordinary roles—to enact laws and decide cases, respectively. If the legislature decides to eliminate an unprotected form of liability, there is no constitutional barrier to doing so. This analysis doesn't conflate the two-step analysis; it follows it. But it is equally true that the legislature may choose to delineate the contours of liability, as the legislature did here. When enacting A.R.S. § 4-312(B), the legislature simultaneously enacted A.R.S. § 4-311, which created a statutory private cause of action. In doing so, the legislature did not eliminate the new dramshop liability the Court created in *Ontiveros*; it instead established the boundaries of the claim.

7. JAI's point about judicial and legislative sequences is not hypothetical.

AzAJ disputes (at 16) JAI's point that that the evolving-constitution view of article 18, § 6 may entail a race between coordinate branches of government to recognize or expand claims, with the availability of constitutional protection depending on which branch got there first. But JAI's point wasn't merely hypothetical; it happened here. As the Court noted in *Ontiveros v. Borak*, "two dramshop bills, which would have reversed the common law rule, were introduced in the legislature in recent years" but failed. 136 Ariz. 500, 512 (1983). The

legislature ultimately enacted A.R.S. § 4-311 in 1986. *See* 1986 Ariz. Sess. Laws, ch. 329, § 1 (2d Reg. Sess.). In other words, this was an active area of legislative activity when the Court decided *Ontiveros*.

Had the legislature enacted either of the pre-1983 bills, article 18, § 6 would not be an issue and the legislature could continue to expand or contract the dram-shop claim. But because the judiciary created such liability before the legislature acted, the court in *Young v. DFW Corp.*, 184 Ariz. 187 (App. 1995), concluded that constitutional protection attached. In other words, whether dramshop liability was constitutionally protected depended wholly on which branch of government recognized it first, the legislature or the judiciary. The anti-abrogation clause does not and should not invite that result.

RESPECTFULLY SUBMITTED this 22nd day of May, 2023.

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